(26,724)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 638.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY,
PLAINTIFF IN ERROR,

vs.

THE CURTIS PUBLISHING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print
Caption	1	1
Præcipe for summons	3	1
Summons and marshal's return of service	5	2
Security for costs	9	3
Declaration	12	4
Special appearance and motion to dismiss	54	28
Order setting date for hearing on motion to dismiss	56	29
Order submitting motion	57	30
Order granting leave to file additional count to declaration	57½	30
Additional count to declaration	59	31
Special appearance and motion to dismiss amended declaration	72	38

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 15, 1919.

	Original.	Print
Judgment	74	39
Bill of exceptions	76	39
Special appearance and motion to dismiss	76	40
Judge's certificate	77	40
Certificate of jurisdictional question	79	41
Petition for writ of error	82	42
Assignment of errors	86	43
Order allowing writ of error	90	45
Bond on writ of error	92	45
Præcipe for record and service	94	46
Writ of error	97	47
Clerk's certificate	99	48
Citation and service	100	48
Assignment of errors	102	49

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, Begun and Held at the United States Court-room, in the City of Chicago, in said District and Division, Before the Honorable George A. Carpenter, District Judge of the United States for the Northern District of Illinois, on the Eighth Day of July, in the Year of Our Lord One Thousand Nine Hundred and Eighteen, Being One of the Days of the Regular July Term of said Court, Begun Monday, the First Day of July, and of Our Independence the 143rd Year.

Present:

Honorable George A. Carpenter, District Judge.
John J. Bradley, U. S. Marshal.
Thomas C. MacMillan, Clerk.

2 In the District Court of the United States, Northern District of Illinois, Eastern Division.

No. 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY (a Corporation)
vs.
THE CURTIS PUBLISHING COMPANY (a Corporation) and WILLIAM BOYD.

Be it remembered, that the above entitled action was commenced by the filing of the following Præcipe in the above entitled cause, in the office of the Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division, on this the 25th day of May, A. D. 1914.

3 UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

District Court, July Term, A. D. 1914.

In Law.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY (a Corporation)
vs.
THE CURTIS PUBLISHING COMPANY (a Corporation) and WILLIAM BOYD.

Damages, $75,000.

The Clerk of said Court will issue a summons in said cause to said defendants, in a plea of trespass on the case to the damage of said

plaintiff in the sum of seventy-five thousand Dollars, direct the same to the United States Marshal for said District to execute, and make it returnable to the July Term of said Court, 1914.

Dated this 25th day of May A. D. 1914.

FYFFE & RYNER AND
PAUL N. DALE,
Plaintiff's Attorneys.

To T. C. MacMillan, Clerk.

[Endorsed:] Gen. No. 31767. District Court United States, Northern District Illinois, Eastern Division. Blumenstock Brothers Advertising Agency (a Corporation) vs. The Curtis Publishing Company (a Corporation) and William Boyd. Præcipe. Filed May 25, 1914. T. C. MacMillan. Fyffe & Ryner and Paul N. Dale, Plaintiff's Attorneys. 1710 Harris Trust Bldg., Rand. 7300.

4 On the same day, to-wit: the 25th day of May 1914, a Writ of Summons issued out of the Clerk's office of said Court against said defendants in said above entitled cause, as prayed for in said Præcipe, which said writ with the return of the Marshal thereon endorsed is in the words and figures following, to-wit:

5 NORTHERN DISTRICT OF ILLINOIS, *ss:*

District Court of the United States of America.

United States of America to the Marshal of the Northern District of Illinois, Greeting:

We command you to summon the Curtis Publishing Company (a corporation) and William Boyd, if found in your district, to be and appear before our Judge of the District Court of the United States for the Northern District of Illinois, on the first day of the next Term thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of July next, to answer unto Blumenstock Brothers Advertising Agency, (a corporation) of a plea of trespass on the case to their damages, as they allege, of Seventy-five Thousand ($75,000.00) Dollars, and have you then and there this Writ.

Witness, The Hon. George A. Carpenter, Judge of the District Court of the United States of America, at Chicago aforesaid, this twenty-fifth day of May, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 138th year.

[SEAL.] T. C. MACMILLAN, *Clerk,*
By JOHN H. R. JAMAR,
Deputy Clerk.

6 [Endorsed:] No. 31767. Marshal's No. —. District Court of the United States, Northern District of Illinois. Blumenstock Bros. Advertising Agency, a corporation, vs. The Curtis Publishing Co., a corporation, et al. Summons. Returnable July Term,

A. D. 1914. T. C. MacMillan, Clerk. Fyffe, Ryner & P. N. Dale, Attorneys. Filed May 27, 1914. T. C. MacMillan, Clerk.

7 *Marshal's Return.*

I have executed this writ within my district in the following manner to-wit:

Upon the within named The Curtis Publishing Co., a corporation and upon William Boyd, Manager of the Curtis Publishing Co. by reading the same to and within his presence and hearing and at the same time delivering to him two true copies of the same at Chicago, Ill., May 26th, A. D. 1914.

LUMAN T. HOY,
U. S. Marshal.
W. H. STREETER, *Deputy.*

Marshal's Fees.

2 services	4.00
1 mile	.06
	$4.06

(Endorsed:) Filed May 27, 1914. T. C. MacMillan, Clerk.

8 And to-wit, the 25th day of May, 1914, come the plaintiff herein by its attorneys and filed in the Clerk's office of said Court its certain Security for Costs in words and figures following, to-wit:

9 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court of the United States, July Term, A. D. 1914.

In Law.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY (a Corporation)
vs.
THE CURTIS PUBLISHING COMPANY (a Corporation) and WILLIAM BOYD.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by them hereby agree and stipulate that execution may issue against our property for all costs not exceeding two hundred dollars taxed against plaintiff.

Dated this 25th day of May A. D. 1914.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JOHN I. SCULL, [SEAL.]
Attorney-in-Fact.

Acknowledged before me this — day of —— 19—.

—— ——, *Clerk.*

(Endorsed:) Filed May 25, 1914. T. C. MacMillan, Clerk.

10 [Endorsed.] Gen. No. 31767. District Court of the United States, Northern District of Illinois. Blumenstock Bros. &c., vs. Curtis Pub. Co. Security for Costs. Filed May 25, 1914. T. C. MacMillan, Clerk. $— Deposited by Fyffe & Ryner, Atty-.

11 And afterwards to-wit: the 28th day of August, 1914, come the plaintiff herein by its attorneys and filed in the Clerk's office of said Court its certain Declaration in words and figures following, to-wit:

12 UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

In the District Court of the United States, Northern District of Illinois, Eastern Division, September Term, 1914.

In Law. No. 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Blumenstock Brothers Advertising Agency, a corporation organized and existing under and by virtue of the laws of the State of Missouri, complains of The Curtis Publishing Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, of a plea of trespass on the case:

1. For that whereas on, to-wit, the first day of January, 1914, at, to-wit, Chicago, in the County of Cook and State of Illinois, Plaintiff was and now is a corporation of Missouri as aforesaid, and engaged in the business and occupation of conducting an advertising agency, in which said business or occupation the plaintiff acted for and represented various and sundry customers or principals desirous from time to time of placing the advertisements of their respective businesses through plaintiff acting therein as the agent in that re-

13 gard of such customers; plaintiff avers that it had many customers of such kind; and in the placing of the advertisements of such customers with the various journals, periodicals, magazines and other publications owned, controlled, edited and published by various persons, firms, and corporations, including the publications owned, controlled, edited and published by the defendant as hereinafter averred, the plaintiff secured and there accrued to the plaintiff great rewards, recompense, commissions and other returns for the

time and labor expended by the plaintiff in and about its said business.

Plaintiff avers that the defendant, The Curtis Publishing Company, was then and there a corporation of Pennsylvania as aforesaid, and was the owner, in control of, and then and there published, sold, and distributed certain publications or periodicals or magazines known as, to-wit, "The Saturday Evening Post," "The Ladies' Home Journal" and "The Country Gentleman"; that the said "The Saturday Evening Post" was then and there and still is a weekly illustrated publication; that the circulation of said "The Saturday Evening Post" aggregated a vast number of distributed copies throughout the United States and the several States thereof, at, to-wit, the time aforesaid and from thence hitherto, said to amount to and in fact amounting to the number of between one and one-half million and two million copies for each week's issue of the said "The Saturday Evening Post"; that said publication known as "The Saturday Evening Post" so owned, controlled, edited and published by the defendant, contained and does contain in each weekly publication a great number of articles, essays, stories, serial novels, comments on matters of literary, commercial, political and general in-
14 terest and many other forms and kinds of writings of great and general interest to the readers, purchasers of and subscribers to the same throughout the United States and in the several States thereof; that the said "The Ladies' Home Journal" was at the time aforesaid and now is published, issued and distributed by the defendant monthly, and the said "The Country Gentlemen" weekly; that the circulation of both of said publications, "The Ladies' Home Journal" and "The Country Gentlemen," was also respectively very large and greatly extended and diffused throughout the United States and the several States thereof, amounting in all to a circulation of about one and one-half million regularly distributed monthly for said "The Ladies' Home Journal" and about two hundred thousand numbers regularly distributed each week for said "The Country Gentleman"; that all three said publications, and particularly the said "The Saturday Evening Post" were read by and reached a very important and well-to-do part of the general community throughout the United States and the several States thereof; that in the conduct and management of its business in publishing said periodicals the said defendant held itself out at all times, and particularly at the time and place aforesaid, as ready, willing and desirous to take, receive, print, publish and distribute in, by and through its said publications or periodicals hereinbefore named, advertisements from and of persons, firms and corporations of and concerning their business and occupations, or of and concerning articles offered by them for sale or by them manufactured, or of and concerning the advantages derived by the public and the member- thereof, by and from dealing with such persons, firms and corporations so advertising in said periodicals and that the said defendant did in fact take and receive for publication and distribution in its said periodicals, ad-
15 vertisements of the character and the kind above mentioned from such persons, firms and corporations; that in the course of said business the defendant dealt with the plaintiff and with many

other advertising agencies similar to the plaintiff in the matter and manner and conduct of their business, and that the defendant did then and there recognize the various advertising agencies such as was then and there the plaintiff, as representatives and agents of the individual persons, firms and corporations whose business or goods or manufactures were then and there in due course of business sought to be advertised and in the regular and due course of its business in owning, controlling, editing, publishing and distributing said publications dealt directly not only with the advertisers themselves but also with advertising agencies such as that owned, managed and conducted by the plaintiff; and that the facilities for advertising so afforded by the defendant through said publications became and were especially valuable to the plaintiff's said customers and to persons for whom the plaintiff acted and whom the plaintiff represented, in that said publications containing such advertisements reached and came to the attention of readers of and subscribers to the same, and to the knowledge and attention of persons interested in the advertisements therein contained, particularly of such readers and persons interested as were then and there and are now residents in the larger Cities of the United States and that the business thus done with the plaintiff and its customers was a business constituting commerce among the several States, or transactions of interstate commerce.

Plaintiff avers that the commercial business of the United States as between merchants and manufacturers doing business with each other and with persons of the public among the several States,
16 is dependent in its operations, growth and development with reference particularly to modes of sale and distribution of goods and manufactures, upon the various advertising facilities offered by newspapers, journals, magazines and other periodicals, published, sold and distributed throughout the United States and the several States thereof; that such newspapers, journals, magazines, periodicals and other publications constitute the chief method of presenting to the purchasing public of the several States the articles, goods, merchandise and manufactures held out for sale by persons, firms and corporations such as the customers above mentioned of the plaintiff, for whom the plaintiff acted herein as agent or representative as aforesaid; that the advertising facilities so offered by such newspapers, journals, magazines and other periodicals, including the said periodicals published by the defendant, were at the time aforesaid and now are absolutely necessary to dealers, merchants and manufacturers such as the customers aforesaid of the plaintiff so as to bring their articles, goods, merchandise and products to the notice and attention of the public; that the periodicals or publications above mentioned, owned, controlled, edited and published by the defendant, particularly that one known as "The Saturday Evening Post" have an important position or rank among a certain number of periodicals, magazines, journals, publications and other advertising mediums which are intended to reach and be read by, and do in fect reach and are read by a large and constantly increasing portion of the public of the several States, who are ready and desirous to purchase the articles, goods, merchandise and products so advertised;

and that there has thus been formed and has grown up and was in existence at the time aforesaid a large body of persons to whom such magazines, periodicals and other publications, including said
17 "The Saturday Evening Post," "The Ladies' Home Journal" and "The Country Gentleman," come and by whom the same are read, and to whom at the times aforesaid came and by whom the same were read, and whose purchases of the goods, wares, merchandise and manufactures from the merchants, dealers and manufacturers such as and including the aforesaid customers of the plaintiff, for whom plaintiff acted and does act as agent or representative, are and were to a great and important extent, directed and influenced by the advertisements in such periodicals and publications, including the said publications of the said defendant; that the commercial and manufacturing business of the United States as it has grown up and developed among the several States and as it exists and is conducted at the present time, as it existed and was conducted at, to-wit, the time aforesaid, was essentially dependent upon opportunities and facilities for advertising in the various journals, periodicals and publications, such as the publications of the defendant.

That the said magazines, journals and periodicals owned and published by the defendant, together with certain other magazines, periodicals and other publications, owned and published by other persons than the defendant, have to a great extent the exclusive control of a certain field of advertising more or less limited in number of advertisers but of great pecuniary value to such publications and their owners; that the magazines, periodicals and other publications which control and do all the advertising business of the field of advertising in question, do not now number more than, to-wit, the number of twenty (20), and that such twenty more or less publications are owned, managed and published by not more than about, to-wit, fifteen persons, firms and corporations; that for the advertising of the business, articles, goods, merchandise and products,
18 offered for sale or offered by and through some means of commerce by the persons so advertising, including therein the customers aforesaid of the plaintiff, there were, at to-wit, the time aforesaid and since that time to the present time there have been, no adequate opportunities or facilities for advertising such business and goods except that offered through and by the publications of the defendant and of the other publishers above mentioned of similar magazines and periodicals; that the defendant at the time aforesaid and from thence hitherto had and does have the control of a large proportion of the advertising business offered to such periodicals and other publications; that the rates for advertising asked for and received by the defendant were at the time aforesaid and are now and have been much higher than the rates for such advertising asked by the owners of the other periodicals and publications covering the same restricted field of advertising; that the defendant then and there was desirous of acquiring and gaining for itself and for its said publications a monopoly of the said restricted lines of advertising, contrary to and in violation of the provisions of the Act of Congress, approved July 2, 1890, entitled "An Act to

Protect Trades and Commerce against Unlawful Restraints and Monopolies," and with intent to injure the property and business of the plaintiff by means which are forbidden and declared to be unlawful by said Act of Congress the defendant did then and there refuse and since then hitherto has refused, without any reasonable cause or pretense for such refusal to accept proper and ordinary advertising matter or copy offered in the reasonable and usual way to the defendant by the plaintiff for printing and publication by the defendant in its periodicals or publications aforesaid, and particularly in the said "The Saturday Evening Post," although the
19 plaintiff did then and there tender such advertising matter in the usual and ordinary way to the defendant and did then and there offer to pay to the said defendant the usual and regular sum or sums of money asked by the defendant for publication of advertising matter in its said publications. But defendant so refused and has continued so to refuse to accept or publish such advertisements offered to it by the plaintiff on behalf of the said customers of the plaintiff, unless the plaintiff agreed to permit the defendant to control and limit at the arbitrary will of the defendant, the amount of advertising given by the plaintiff to the owners or publishers of the other magazines, journals, periodicals and other publications aforesaid, competing with the defendant for and in the field of advertising above mentioned and described.

By means of each and all said illegal and wrongful acts so wrongfully and illegally done by the defendant in pursuance of its object, attempt and scheme then and there to create a monopoly for its own benefit in, and to monopolize the said advertising business hereinbefore described, the plaintiff did then and there lose the business of its said customers for whom it had been and was then and there acting as agent and representative in the placing of advertisements with the said publications of the defendant and said other publications, and was prevented from making further contracts with customers in said lines of advertising business for the placing of their advertising matter in the said publications of the defendant and in consequence thereof in any other publications of a like or similar character; and the business of the plaintiff was therein and thereby greatly restrained and diminished and the plaintiff was then and there injured in its business and property by and through the said wrongful and illegal acts of the defendant in its said attempt to monopolize the said advertising busi-
20 ness, which acts are declared to be unlawful by said Act of Congress of July 2, 1890; to the loss and damage of the plaintiff in the sum of Twenty-five thousand ($25,000.) Dollars, to recover three-fold which damages under Section 7 of said Act this suit is brought.

2. And for that also whereas on, to-wit, the first day of January, 1914, at, to-wit, Chicago, in the County of Cook and State of Illinois, plaintiff was and now is a corporation of Missouri as aforesaid, and engaged in the business and occupation of conducting an advertising agency, in which said business or occupation the plaintiff acted for and represented various and sundry customers or prin-

cipals desirous from time to time of placing the advertisements of their respective businesses through plaintiff acting therein as the agent in that regard of such customers; plaintiff avers that it had many customers of such kind; and in the placing of the advertisements of such customers with the various journals, periodicals, magazines and other publications owned, controlled, edited and published by various persons, firms and corporations, including the publications owned, controlled, edited and published by the defendant as hereinafter averred, the plaintiff secured and there accrued to the plaintiff great rewards, recompense, commissions and other returns for the time and labor expended by the plaintiff in and about its said business.

Plaintiff avers that the defendant, The Curtis Publishing Company, was then and there a corporation of Pennsylvania as aforesaid, and was the owner, in control of, and then and there published, sold, and distributed certain publications or periodicals or magazines known as, to-wit, "The Saturday Evening Post," "The Ladies' Home Journal" and "The Country Gentlemen"; that the said "The Saturday Evening Post" was then and there and still is a weekly illustrated publication; that the circulation of
21 said "The Saturday Evening Post" aggregated a vast number of distributed copies throughout the United States and the several States thereof, at, to-wit, the time aforesaid and from thence hitherto, said to amount to and in fact amounting to the number of between one and one-half million and two million copies for each week's issue of the said "The Saturday Evening Post"; that said publication known as "The Saturday Evening Post" so owned, controlled, edited and published by the defendant, contained and does contain in each weekly publication a great number of articles, essays, stories, serial novels, comments on matters of literary, commercial, political and general interest and many other forms and kinds of writings of great and general interest to the readers, purchasers of and subscribers to the same throughout the United States and in the several States thereof; that the said "The Ladies Home Journal" was at the time aforesaid and now is published issued and distributed by the defendant monthly, and the said, "The Country Gentleman," weekly; that the circulation of both said publications, "The Ladies Home Journal" and "The Country Gentleman" was also respectively very large and greatly extended and diffused throughout the United States and the several States ther-of, amounting in all to a circulation of about one and one-half million regularly distributed monthly for said "The Ladies Home Journal" and about two hundred thousand numbers regularly distributed each week for said "The Country Gentleman"; that all three said publications, and particularly the said "The Saturday Evening Post" were read by and reached a very important and well-to-do part of the general community throughout the United States and the several States thereof; that in the conduct and management of its said business in publishing said periodicals the said defendant held itself out at all times, and particularly

22 at the time and place aforesaid, as ready, willing and desirous to take, receive, print, publish and distribute in, by and through its said publications or periodicals hereinbefore named, advertisements from and of persons, firms and corporations of and concerning their business and occupations, or of and concerning articles offered by them for sale or by them manufactured, or of and concerning the advantages derived by the public and the members thereof, by and from dealing with such persons, firms and corporations so advertising in said periodicals and that the said defendant did in fact take and receive for publication and distribution in its said periodicals, advertisements of the character and the kind above mentioned from such persons, firms and corporations; that in the course of said business the defendant dealt with the plaintiff and with many other advertising agencies similar to the plaintiff in the matter and manner and conduct of their business, and that the defendant did then and there recognize the various advertising agencies such as was then and there the plaintiff, as representatives and agents of the individuals persons, firms, and corporations whose business or goods or manufactures were then and there in due course of business sought to be advertised, and in the regular and due course of its business in owning, controlling, editing, publishing and distributing said publications dealt directly not only with the advertisers themselves but also with advertising agencies such as that owned, managed and conducted by the plaintiff; and that the facilities for advertising so afforded by the defendant through said publications became and were especially valuable to the plaintiff's said customers and to persons for whom the plaintiff acted and whom the plaintiff represented, in that said publications containing such advertisements reached and came to the attention of readers of and subscribers to the same, and to
23 the knowledge and attention of persons interested in the advertisements therein contained, particularly of such readers and persons interested as were then and there and are now residents in the larger Cities of the United States, and that the business thus done with the plaintiff and its customers was a business constituting commerce among the several States, or transactions of interstate commerce.

Plaintiff avers that the commercial business of the United States as between merchants and manufacturers doing business with each other and with persons of the public among the several States, is dependent in its operations, growth and development with reference particularly to modes of sale and distribution of goods and manufactures, upon the various advertising facilities offered by newspapers, journals, magazines and other periodicals, published, sold and distributed throughout the United States and the several States thereof; that such newspapers, journals, magazines, periodicals and other publications constitute the chief method of presenting to the purchasing public of the several States the articles, goods, merchandise and manufactures held out for sale by persons, firms and corporations such as the customers above mentioned of the plaintiff, for whom the plaintiff acted herein as agent or representative as aforesaid; that the ad-

vertising facilities so offered by such newspapers, journals, magazines and other periodicals, including the said periodicals published by the defendant, were at the time aforesaid and now are absolutely necessary to dealers, merchants and manufacturers such as the customers aforesaid of the plaintiff, so as to bring their articles, goods, merchandise and products to the notice and attention of the public; that the periodicals or publications above mentioned, owned, controlled, edited and published by the defendant, particularly that one known as "The Saturday Evening Post" have an important position
24 or rank among a certain number of periodicals, magazines, journals, publications and other advertising mediums, which are intended to reach and be read by, and do in fact reach and are read by a large and constantly increasing portion of the public of the several States, who are ready and desirous to purchase the articles, goods, merchandise and products so advertised; and that there has thus been formed and has grown up and was in existence at the time aforesaid a large body of persons to whom such magazines, periodicals and other publications, including said "The Saturday Evening Post," "The Ladies Home Journal" and "The Country Gentleman", come and by whom the same are read, and to whom at the times aforesaid come and by whom the same were read, and whose purchases of the goods, wares, merchandise and manufactures from the merchants, dealers and manufacturers such as and including the aforesaid customers of the plaintiff, for whom plaintiff acted and does act as agent or representative, are and were to a great and important extent, directed and influenced by the advertisements in such periodicals and publications, including the said publications of the said defendant; that the commercial and manufacturing business of the United States as it has grown up and developed among the several States and as it exists and is conducted at the present time, and as it existed and was conducted at, to-wit, the time aforesaid, was essentially dependent upon opportunities and facilities for advertising in the varous journals, periodicals and publications, such as the publications of the defendant.

That the said magazines, journals and periodicals owned and published by the defendant, together with certain other magazines, periodicals and other publications, owned, and published by other
25 persons than the defendant, have to a great extent the exclusive control of a certain field of advertising more or less limited in number of advertisers but of great pecuniary value to such publications and their owners; that the magazines, periodicals and other publications which control and do all the advertising business of the field of advertising in question, do not now number more than, to-wit, the number of twenty (20), and that such twenty more or less publications are owned, managed and published by not more than about, to-wit, fifteen persons, firms and corporations; that for the advertising of the business, articles, goods, merchandise and products, offered for sale or offered by and through some means of commerce by the persons so advertising, including therein the customers aforesaid of the plaintiff, there were, at to-wit the time aforesaid, and since that time to the present time there have been, no

adequate opportunities or facilities for advertising such business and goods except that offered through and by the publications of the defendant and of the other publishers above mentioned of similar magazines and periodicals; that the defendant at the time aforesaid and from thence hitherto had and does have the control of a large proportion of the advertising business offered to such periodicals and other publications; that the rates for advertising asked for and received by the defendant were at the time aforesaid and are now and have been much higher than the rates for such advertising asked by the owners of the other periodicals and publications covering the same restricted field of advertising; that the defendant then and there was desirous of acquiring and gaining for itself and for its said publications a monopoly of the said restricted lines of advertising, contrary to and in violation of the provisions of the Act of Congress approved July 2, 1890, entitled "An Act to Protect
26 Trade and Commerce Against Unlawful Restraints and Monopolies," and with intent to injure the property and business of the plaintiff by means which are forbidden and declared to be unlawful by said Act of Congress the defendant did then and there refuse and since then hitherto has refused, without any reasonable cause or pretense for such refusal to accept proper and ordinary advertising matter or copy offered in the reasonable and usual way to the defendant by the plaintiff for printing and publication by the defendant in its periodicals or publications aforesaid, and particularly in the said "The Saturday Evening Post", although the plaintiff did then and there tender such advertising matter in the usual and ordinary way to the defendant and did then and there offer to pay to the said defendant the usual and regular sum or sums of money asked by the defendant for publication of advertising matter in its said publication. But defendant so refused and has continued so to refuse to accept or publish such advertisements offered to it by the plaintiff on behalf of the said customers of the plaintiff unless the plaintiff agreed to give to the defendant a preponderating amount of advertising business and a greater amount than it gave or might give to the other persons, firms and corporations publishing magazines, periodicals and publications which were then and there competitors of the defendant and of the publications of the defendant in regard to the publication of such advertisements; and the defendant demanded of the plaintiff that it take away from the said publishers and owners of other similar publications as aforesaid a large amount of the advertisement which had been given by the plaintiff to such other publications not owned and published by the defendant; which said acts of the defendant in so refusing to publish the advertisements offered it by the plaintiff and in seeking to
27 control and reduce the amount of advertising given by the plaintiff to the other publications in the same line of business owned and controlled by persons other than the defendant, and who were and are competitors of the defendant, were for the wrongful and illegal purpose of attempting to create a monopoly and attempting to monopolize the said advertising business, contrary to and in violation of said Act of Congress of July 2, 1890.

By means of each and all said illegal and wrongful acts so wrongfully and illegally done by the defendant in pursuance of its object, attempt and scheme then and there to create a monopoly for its own benefit in, and to monopolize the said advertising business hereinbefore described, the plaintiff did then and there lose the business of its said customers for whom it had been and was then and there acting as agent and representative in the placing of advertisements with the said publicatons of the defendant and said other publications, and was prevented from making further contracts with customers in said lines of advertising business for the placing of their advertising matter in the said publications of the defendant and in consequence thereof in any other publications of a like or similar character; and the business of the plaintiff was therein and thereby greatly restrained and diminished and the plaintiff was then and there injured in its business and property by and through the said wrongful and illegal acts of the defendant in its said attempt to monopolize the said advertising business, which acts are declared to be unlawful by said Act of Congress of July 2, 1890, to the loss and damage of the plaintiff in the sum of Twenty-five thousand ($25,000.) Dollars, to recover three-fold which damages under Section 7 of said Act this suit is brought.

28 3. And for that also whereas on, to-wit, the first day of January, 1914, at, to-wit, Chicago, in the County of Cook and State of Illinois, plaintiff was and now is a corporation of Missouri as aforesaid, and engaged in the business and occupation of conducting an advertising agency, in which said business or occupation the plaintiff acted for and represented various and sundry customers or principals desirous from time to time of placing the advertisements of their respective businesses through plaintiff acting therein as the agent in that regard of such customers; plaintiff avers that it had many customers of such kind and in the placing of the advertisements of such customers with the various journals, periodicals, magazines and other publications owned, controlled, edited and published by various persons, firms and corporations, including the publications owned, controlled, edited and published by the defendant as hereinafter averred, the plaintiff secured and there accrued to the plaintiff great rewards, recompense, commissions and other returns for the time and labor expended by the plaintiff in and about its said business.

Plaintiff avers that the defendant, The Curtis Publishing Company, was then and there a corporation of Pennsylvania as aforesaid, and was the owner, in control of, and then and there published, sold and distributed certain publications or periodicals or magazines known as, to-wit, "The Saturday Evening Post," "The Ladies Home Journal" and "The Country Gentleman"; that the said "The Saturday Evening Post" was then and there and still is a weekly illustrated publication; that the circulation of said "The Saturday Evening Post" aggregated a vast number of distributed copies throughout the United States and the several States thereof, at, to-wit, the time aforesaid and from thence hitherto, said to amount to and in fact amounting to the number of between one and one-

half million and two million copies for each week's issue of the said "The Saturday Evening Post"; that said publication known as "The Saturday Evening Post" so owned, controlled, edited and published by the defendant, contained and does contain in each weekly publication a great number of articles, essays, stories, serial novels, comments on matters of literary, commercial, political and general interest and many other forms and kinds of writings of great and general interest to the readers, purchasers of and subscribers to the same throughout the United States and in the several States thereof; that the said "The Ladies Home Journal" was at the time aforesaid and now is published, issued and distributed by the defendant monthly, and the said "The Country Gentleman," weekly; that the circulation of both said publications, "The Ladies Home Journal" and "The Country Gentleman," was also respectively very large and greatly extended and diffused throughout the United States and the several States thereof, amounting in all to a circulation of about one and one-half million regularly distributed monthly for said "The Ladies Home Journal" and about two hundred thousand numbers regularly distributed each week for said "The Country Gentleman"; that all three said publications, and particularly the said "The Saturday Evening Post" were read by and reached a very important and well-to-do part of the general community throughout the United States and the several States thereof; that in the conduct and management of its said business in publishing said periodicals the said defendant held itself out at all times, and particularly at the time and place aforesaid, as ready, willing and desirous to take, receive, print, publish and distribute in, by and through its said publications or periodicals hereinbefore named, advertisements from and of persons, firms and corporations of and concerning their business and occupations, or of and concerning articles offered by them for sale or by them manufactured, or of and concerning the advantages derived by the public and the members thereof, by and from dealing with such persons, firms and corporations so advertising in said periodicals and that the said defendant did in fact take and receive for publication and distribution in its said periodicals, advertisements of the character and the kind above mentioned from such persons, firms and corporations.

The plaintiff avers that there are throughout the United States a great number of persons, firms and corporations conducting an advertising business similar to that of the plaintiff in which business such persons, firms and corporations represent the merchants, manufacturers or other persons engaged in commercial enterprises who have need of advertisements in support of the growth of their business and for the development and extension of the sale and distribution of the articles, goods, merchandise and manufactures offered by them for sale and for the consideration of the public at large; that the business coming through and from such agencies is of great pecuniary value and yields to the owners and publishers of magazines and periodicals such as those owned and published by the defendant large pecuniary returns from the printing and pub-

lishing of such advertisements in such periodicals. Plaintiff avers that advertising business of the character offered by such agencies to the defendant and to others publishing similar publications, is of more or less defined character and that such advertising business whether coming directly from the advertising merchants and manufacturers or through the medium of agencies, such as those conducted by the plaintiff and the others, above mentioned, can be placed only in a comparatively limited number of periodicals, magazines and other publications such as those owned and published by the defendant and others of a similar character,
31 owned and published by persons, firms and corporations other than the defendant.

Plaintiff further avers that in the course of its said business the defendant dealt with the plaintiff and with many of the other said advertising agencies similar to the plaintiff in the matter and manner and conduct of their business, and that the defendant did then and there recognize the said various advertising agencies including then and there the plaintiff, as representatives and agents respectively of the individual persons, firms and corporations whose business or goods or manufactures were then and there in due course of business sought to be advertised through said agencies, and in the regular and due course of its business in owning, controlling, editing, publishing and distributing said publications dealt directly not only with the advertisers themselves but also with advertising agencies of the kind mentioned including the plaintiff; and that the facilities for advertising so afforded by the defendant through said publications became and were especially valuable to the customers of the plaintiff and said other agencies and to persons for whom they acted and whom they represented, in that said publications containing such advertisements reached and came to the attention of readers of and subscribers to the same, and to the knowledge and attention of persons interested in the advertisements therein contained, particularly to the knowledge and attention of such readers and persons interested as were then and there and are now residents in the larger cities of the United States, and of the several States thereof, and that the business thus done with the said advertising agencies and their customers including the plaintiff and its customers, was a business constituting commerce among the several States, or transactions of interstate commerce.

Plaintiff avers that the commercial business of the United
32 States as between merchants and manufacturers doing business with each other and with persons of the public among the several States, is dependent in its operations, growth and development with reference particularly to modes of sale and distribution of goods and manufactures, upon the various advertising facilities offered by newspapers, journals, magazines and other periodicals, published, sold and distributed throughout the United States and the several States thereof; that such newspapers, journals, magazines, periodicals and other publications constitute the chief method of presenting to the purchasing public of the several States the articles, goods, merchandise and manufactures held out for sale by persons,

firms and corporations such as the customers above mentioned of the plaintiff, and the said other advertising agencies for whom they acted herein as agents or representatives as aforesaid; that the advertising facilities so offered by such newspapers, journals, magazines and other periodicals, including the said periodicals published by the defendant, were at the time aforesaid and now are absolutely necessary to dealers, merchants and manufacturers such as the customers aforesaid of the plaintiff and said other advertising agencies so as to bring their articles, goods, merchandise and products to the notice and attention of the public; that the periodicals or publications above mentioned, owned, controlled, edited and published by the defendant, particularly that one known as "The Saturday Evening Post" have an important position or rank among a certain number of periodicals, magazines, journals, publications and other advertising mediums, which are intended to reach and be read by, and do in fact reach and are read by a large and constantly increasing portion of the public of the several States, who are ready and desirous to purchase the articles, goods, merchandise and pro-
33 ducts so advertised; and that there has thus been formed and has grown up and was in existence at the time aforesaid a large body of persons to whom such magazines, periodicals and other publications, including said "The Saturday Evening Post," "The Ladies Home Journal" and "The Country Gentleman," come and by whom the same are read, and to whom at the times aforesaid came and by whom the same were read, and whose purchases of the goods, wares, merchandise and manufactures from the merchants, dealers, and manufacturers such as and including the aforesaid customers of the plaintiff, and of the said other advertising agencies for whom they acted and do act as agents or representatives, are and were to a great and important extent, directed and influenced by the advertisements in such periodicals and publications, including the said publications of the said defendant; that the commercial and manufacturing business of the United States as it has grown up and developed among the several States and as it exists and is conducted at the present time, and as it existed and was conducted at, to-wit, the time aforesaid, was essentially dependent upon opportunities and facilities for advertising in the various journals, periodicals and publications, such as the publications of the defendant.

That the said magazines, journals and periodicals owned and published by the defendant, together with certain other magazines, periodicals and other publications, owned, and published by other persons than the defendant, had at to-wit, the time aforesaid and do now have, almost the exclusive control of a certain field of advertising more or less limited in number of advertisers, but of great pecuniary value to such publications and their owners; that the magazines, periodicals and other publications which control and do practically all of the advertising business of the field of advertising in question, do not now number more than, to-wit, the number of twenty
34 (20), and that such twenty, more or less, publications are owned, managed and published by not more than about, to-wit, fifteen person-, firms and corporations; that for the advertis-

ing of the business, articles, goods, merchandise and products, offered for sale or for the advertising of various means of commerce by the persons so advertising, including therein the customers aforesaid of the plaintiff, and the other advertising agencies referred to above there were, at to-wit, the time aforesaid, and since that time to the present time there have been, no adequate opportunities or facilities for advertising such business and goods except that offered through and by the publications of the defendant and of the other publishers above mentioned of similar magazines and periodicals; that the defendant at, to-wit, the time aforesaid and from thence hitherto, had and does still have the control of a large proportion of the advertising business offered to such periodicals and other publications; that the rates for advertising asked for and received by the defendant were at the time aforesaid and have been since then and are now much higher than the rates for such advertising asked by the owners of the other periodicals and publications covering the same restricted field of advertising; that the defendant then and there to-wit at the time aforesaid, was desirous of acquiring and gaining for itself and for its said publications illegally and wrongfully a monopoly of the said restricted lines of advertising, in the United States and the several States thereof, contrary to and in violation of the provisions of the Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and with intent to injure the property and business of the plaintiff and of the other advertising agencies hereinbefore referred to and of the owners and publishers of
35 magazines and periodicals similar to and in competition with those owned and published by the defendant, and to obtain or to attempt to obtain a monopoly of the said restricted field of advertising, by means which are forbidden and declared to be unlawful by said Act of Congress, the defendant did then and there refuse and since then hitherto has refused, without any reasonable cause or pretense for such refusal to accept proper and ordinary advertising matter or copy offered in the reasonable and usual way to the defendant by the plaintiff and by certain of the other said advertising agencies, for printing and publication by the defendant in its periodicals or publications aforesaid, and particularly in the said "The Saturday Evening Post," although the plaintiff and said other advertising agencies last referred to did then and there tender such advertising matter, in the usual and ordinary way, to the defendant and did then and there offer to pay to the said defendant the usual and regular sum or sums of money asked by the defendant for publication of advertising matter in its said publications. But the defendant so refused and has continued so to refuse to accept or publish such advertisements offered to it by the plaintiff on behalf of the said customers of the plaintiff, and by the other said agencies on behalf of their respective customers, unless they each agreed to permit the defendant to control and limit at the arbitrary will of the defendant, the amount of advertising given by said agencies including the plaintiff to the owners or publishers of the other magazines, journals, periodicals and other publications aforesaid, competing

with the defendant for and in the field of advertising above mentioned and described.

By means of each and all said illegal and wrongful acts so
36 wrongfully and illegally done by the defendant in pursuance of its object, attempt and scheme then and there to create a monopoly for its own benefit in, and to monopolize, the said advertising business hereinbefore described, the plaintiff did then and there lose the business of its said customers for whom it had been and was then and there acting as agent and representative in the placing of advertisements with the said publications of the defendant and said other publications, and was prevented from making further contracts with said or other customers in said lines of advertising business for the placing of their advertising matter in the said publications of the defendant and in consequence thereof in any other publications of a like or similar character; and the business of the plaintiff was therein and thereby greatly restrained and diminished and the plaintiff was then and there injured in its business and property by and through the said wrongful and illegal acts of the defendant in its said attempt to monopolize the said advertising business, which acts are declared to be unlawful by said Act of Congress of July 2, 1890; to the loss and damage of the plaintiff in the sum of Twenty-five thousand ($25,000) Dollars, to recover three-fold which damages under Section 7 of said Act this suit is brought.

4. And for that also whereas, on, to-wit, the first day of January, 1914, at, to-wit, Chicago, in the County of Cook and State of Illinois, plaintiff was and now is a corporation of Missouri as aforesaid, and engaged in the business and occupation of conducting an advertising agency, in which said business or occupation the plaintiff acted for and represented various and sundry customers or principals desirous from time to time of placing the advertisements of their respective businesses through plaintiff acting therein as the agent in that regard of such customers; plaintiff avers that it had many
37 customers of such kind and in the placing of the advertisements of such customers with the various journals, periodicals, magazines and other publications owned, controlled, edited and published by various persons, firms and corporations, including the publications owned, controlled, edited and published by the defendant as hereinafter averred, the plaintiff secured and there accrued to the plaintiff great rewards, recompense, commissions and other returns for the time and labor expended by the plaintiff in and about its said business.

Plaintiff avers that the defendant, The Curtis Publishing Company, was then and there a corporation of Pennsylvania as aforesaid, and was the owner, in control of, and then and there published, sold, and distributed certain publications or periodicals or magazines known as, to-wit, "The Saturday Evening Post," "The Ladies Home Journal" and "The Country Gentleman"; that the said "The Saturday Evening Post" was then and there and still is a weekly illustrated publication; that the circulation of said "The Saturday Evening Post" aggregated a vast number of distributed copies throughout the United States and the several States thereof, at, to-wit, the time afore-

said and from thence hitherto, said to amount to and in fact amounting to the number of between one and one-half million and two million copies for each week's issue of the said "The Saturday Evening Post"; that said publication known as "The Saturday Evening Post"; so owned, controlled, edited and published by the defendant, contained and does contain in each weekly publication a great number of articles, essays, stories, serial novels, comments on matters of literary, commercial, political and general interest and
38 many other forms and kinds of writings of great and general interest to the readers, purchasers of and sub-cribers to the same throughout the United States and in the several States thereof; that the said "The Ladies Home Journal" was at the time aforesaid and now is published, issued and distributed by the defendant monthly, and the said "The Country Gentleman," weekly; that the circulation of both said publications, "The Ladies Home Journal" and "The Country Gentleman" was also respectively very large and greatly extended and diffused throughout the United States and the several States thereof, amounting in all to a circulation of about one and one-half million regularly distributed monthly for said "The Ladies Home Journal" and about two hundred thousand numbers regularly distributed each week for said "The Country Gentleman"; that all three said publications, and particularly the said "The Saturday Evening Post" were read by and reached a very important and well-to-do part of the general community throughout the United States and the several States thereof; that in the conduct and management of its said business in publishing said periodicals the said defendant held itself out at all times, and particularly at the time and place aforesaid, as ready, willing and desirous to take, receive, print, publish and distribute in, by and through its said publications or periodicals hereinbefore named, advertisements from and of persons, firms and corporations of and concerning their business and occupations, or of and concerning articles offered by them for sale or by them manufactured, or of and concerning the advantages derived by the public and the members thereof, by and from dealing with such persons, firms and corporations so advertising in said periodicals and that the said defendand did in fact take and receive for publication and distribution in its said periodicals, advertise-
39 ments of the character and the kind above mentioned from such persons, firms and corporations.

Plaintiff avers that there are throughout the United States a great number of persons, firms and corporations conducting an advertising business similar to that of the plaintiff in which business such persons, firms and corporations represent the merchants, manufacturers or other persons engaged in commercial enterprises who have need of advertisements in support of the growth of their business and for the development and extension of the sale and distribution of the articles, goods, merchandise and manufactures offered by them for sale and for the consideration of the public at large; that the business coming through and from such agencies is of great pecuniary value and yields to the owners and publishers of magazines and periodicals such as those owned and published by the defendant

large pecuniary returns from the printing and publishing of such advertisements in such periodicals. Plaintiff avers that advertising business of the character offered by such agencies to the defendant and to others publishing similar publications, is of more or less defined character and that such advertising business whether coming directly from the advertising merchants and manufacturers or through the medium of agencies, such as those conducted by the plaintiff and the others, above mentioned, can be placed only in a comparatively limited number of periodicals, magazines and other publications such as those owned and published by the defendant and others of a similar character owned and published by persons, firms and corporations other than the defendant.

Plaintiff further avers that in the course of its said business the defendant dealt with the plaintiff and with many of the other said advertising agencies similar to the plaintiff in the matter and
40 manner and conduct of their business, and that the defendant did then and there recognize the said various advertising agencies including then and there the plaintiff, as representatives and agents respectively of the individual persons, firms and corporations whose business or goods or manufactures were then and there in due course of business sought to be advertised through said agencies, and in the regular and due course of its business in owning, controlling, editing, publishing and distributing said publications dealt directly not only with the advertisers themselves but also with advertising agencies of the kind mentioned including the plaintiff; and that the facilities for advertising so afforded by the defendant through said publications became and were especially valuable to the customers of the plaintiff and said other agencies and to persons for whom they acted and whom they represented, in that said publications containing such advertisements reached and came to the attention of readers of and subscribers to the same, and to the knowledge and attention of persons interested in the advertisements therein contained, particularly to the knowledge and attention of such readers and persons interested as were then and there and are now residents in the larger cities of the United States, and of the several States thereof, and that the business thus done with the said advertising agencies and their customers including the plaintiff and its customers, was a business constituting commerce among the several States, or transactions of interstate commerce.

Plaintiff avers that the commercial business of the United States as between merchants and manufacturers doing business with each other and with persons of the public among the several States, is dependent in its operations, growth and development with reference particularly to modes of sale and distribution of goods and manufactures, upon the various advertising facilities offered by news-
41 papers, journals, magazines and other periodicals, published, sold and distributed throughout the United States and the several States thereof; that such newspapers, journals, magazines, periodicals and other publications constitute the chief method of presenting to the purchasing public of the several States the articles, goods, merchandise and manufactures held out for sale by persons,

firms and corporations such as the customers above mentioned of the plaintiff, and the said other advertising agencies for whom they acted herein as agents or representatives as aforesaid; that the advertising facilities so offered by such newspapers, journals, magazines and other periodicals, including the said periodicals published by the defendant, were at the time aforesaid and now are absolutely necessary to dealers, merchants and manufacturers such as the customers aforesaid of the plaintiff and said other advertising agencies so as to bring their articles, goods, merchandise and products to the notice and attention of the public; that the periodicals or publications above mentioned, owned, controlled, edited and published by the defendant, particularly that one known as "The Saturday Evening Post" have an important position or rank among a certain number of periodicals, magazines, journals, publications and other advertising mediums, which are intended to reach and be read by, and do in fact reach and are read by a large and constantly increasing portion of the public of the several States, who are ready and desirous to purchase the articles, goods, merchandise and products so advertised; and that there has thus been formed and has grown up and was in existence at time aforesaid a large body of persons to whom such magazines, periodicals and other publications, including said "The Saturday Evening Post", "The Ladies Home Journal" and "The Country Gentleman", come and by whom the same are read, and to whom at the times aforesaid came and by whom the same
42 were read, and whose purchases of the goods, wares, merchandise and manufactures from the merchants, dealers and manufacturers such as and including the aforesaid customers of the plaintiff, and of the said other advertising agencies for whom they acted and do act as agents or representatives, are and were to a great and important extent, directed and influenced by the advertisements in such periodicals and publications, including the said publications of the said defendant; that the commercial and manufacturing business of the United States as it has grown up and developed among the several States and as it exists and is conducted at the present time, and as it existed and was conducted at, to-wit, the time aforesaid, was essentially dependent upon opportunities and facilities for advertising in the various journals, periodicals, and publications such as the publications of the defendant.

That the said magazines, journals and periodicals owned and published by the defendant, together with certain other magazines, periodicals and other publications, owned, and published by other persons than the defendant, had at to-wit, the time aforesaid and do now have, almost the exclusive control of a certain field of advertising more or less limited in number of advertisers, but of great pecuniary value to such publications and their owners; that the magazines, periodicals and other publications which control and do practically all of the advertising business of the field of advertising in question, do not now number more than, to-wit, the number of twenty (20) and that such twenty, more or less, publications are owned, managed and published by not more than about, to-wit, fifteen persons, firms and corporations; that for the advertising of the business, articles,

goods, merchandise and products, offered for sale or for the advertising of various means of commerce by the persons so advertising, including therein the customers aforesaid of the plaintiff, and the other advertising agencies referred to above, there were, at to-wit, the time aforesaid, and since that time to the present time there have been, no adequate opportunities or facilities for advertising such business and goods except that offered through and by the publications of the defendant and of the other publishers above mentioned of similar magazines and periodicals; that the defendant at to-wit, the time aforesaid and from thence hitherto, had and does still have the control of a large proportion of the advertising business offered to such periodicals and other publications; that the rates for advertising asked for and received by the defendant were at the time aforesaid and have been since then and are now much higher than the rates for such advertising asked by the owners of the other periodicals and publications covering the same restricted field of advertising; that the defendant then and there, to-wit, at the time aforesaid, was desirous of acquiring and gaining for itself and for its said publications illegally and wrongfully a monopoly of the said restricted lines of advertising, in the United States and the several States thereof, contrary to and in violation of the provisions of the Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and with intent to injure the property and business of the plaintiff and of the other advertising agencies hereinbefore referred to and of the owners and publishers of magazines and periodicals similar to and in competition with those owned and published by the defendant, and to obtain or to attempt to obtain a monopoly of the said restricted field of advertising, by means which are forbidden and declared to be unlawful by said Act of Congress, the defendant did then and there refuse and since then hitherto has refused, without any reasonable cause or pretense for such refusal to accept proper and ordinary advertising matter or copy offered in the reasonable and usual way to the defendant by the plaintiff and by certain of the other said advertising agencies, for printing and publication by the defendant in its periodicals or publications aforesaid, and particularly in the said "The Saturday Evening Post", although the plaintiff and said other advertising agencies last referred to did then and there tender such advertising matter, in the usual and ordinary way, to the defendant and did then and there offer to pay to the said defendant the usual and regular sum or sums of money asked by the defendant for publication of advertising matter in its said publications. But defendant so refused and has continued so to refuse to accept or publish such advertisements offered to it by the plaintiff on behalf of the said customers of the plaintiff and by the other said agencies on behalf of their respective customers unless the plaintiff and the other said agencies respectively agreed to give to the defendant a preponderating amount of advertising business and a greater amount than they respectively gave or might give to the other persons, firms and corporations publishing magazines, periodicals and publications which were then and there competitors of the defend-

43

44

ant and of the publications of the defendant in regard to the publication of such advertisements; and the defendant demanded of the plaintiff that it take away from the said publishers and owners of other similar publications as aforesaid a large amount of the advertisement which had been given by the plaintiff to such other publications not owned and published by the defendant; which said acts of the defendant in so refusing to publish the advertisements offered it by the plaintiff and in seeking to control and reduce the
45 amount of advertising given by the plaintiff to the other publications in the same line of business owned and controlled by persons other than the defendant, and who were and are competitors of the defendant, were for the wrongful and illegal purpose of attempting to create a monopoly and attempting to monopolize the said advertising business, contrary to and in violation of said Act of Congress of July 2, 1890.

By means of each and all said illegal and wrongful acts so wrongfully and illegally done by the defendant in pursuance of its object, attempt and scheme then and there to create a monopoly for its own benefit in, and to monopolize, the said advertising business hereinbefore described, the plaintiff did then and there lose the business of its said customers for whom it had been and was then and there acting as agent and representative in the placing of advertisements with the said publications of the defendant and said other publications, and was prevented from making further contracts with said or other customers in said lines of advertising business for the placing of their advertising matter in the said publications of the defendant and in consequence ther-of in any other publications of a like or similar character; and the business of the plaintiff was therein and thereby greatly restrained and diminished and the plaintiff was then and there injured in its business and property by and through the said wrongful and illegal acts of the defendant in its said attempt to monopolize the said advertising business, which acts are declared to be unlawful by said Act of Congress of July 2, 1890; to the loss and damage of the plaintiff in the sum of Twenty-five Thousand ($25,000) Dollars, to recover threefold which damages under Section 7 of said Act this suit is brought.

5. And for that also whereas on, to-wit, the first
46 day of January 1914, at, to-wit, Chicago, in the County of Cook and State of Illinois, plaintiff was and now is a corporation of Missouri as aforesaid, and engaged in the business and occupation of conducting an advertising agency, in which said business or occupation the plaintiff acted for and represented various and sundry customers or principals desirous from time to time of placing the advertisements of their respective businesses through plaintiff acting therein as the agent in that regard of such customers; plaintiff avers that it had many customers of such kind and in the placing of the advertisements of such customers with the various journals, periodicals, magazines and other publications owned, controlled, edited and published by various persons, firms and corporations, including the publications owned, controlled, edited and published by the defendant as hereinafter averred, the

plaintiff secured and there accrued to the plaintiff great rewards, recompense, commissions and other returns for the time and labor expended by the plaintiff in and about its said business.

Plaintiff avers that the defendant, The Curtis Publishing Company, was then and there a corporation of Pennsylvania as aforesaid, and was the owner, in control of, and then and there published, sold, and distributed certain publications or periodicals or magazines known as, to-wit, "The Saturday Evening Post," "The Ladies Home Journal" and "The Country Gentleman"; and the said "The Saturday Evening Post" was then and there and still is a weekly illustrated publication; that the circulation of said "The Saturday Evening Post" aggregated a vast number of distributed copies throughout the United States and the several States ther-of, at, to-wit, the time aforesaid and from thence hitherto, said to amount to and in fact amounting to the number of between one and one-half million and two million copies for each week's
47 issue of the said "The Saturday Evening Post"; that said publication known as "The Saturday Evening Post" so owned, controlled, edited and published by the defendant, contained and does contain in each weekly publication a great number of articles, essays, stories, serial novels, comments on matters of literary, commercial, political and general interest and many other forms and kinds of writings of great and general interest to the readers, purchasers of and subscribers to the same throughout the United States and in the several States thereof; that the said "The Ladies Home Journal" was at the time aforesaid and now is published, issued and distributed by the defendant monthly and the said "The Country Gentleman," weekly; that the circulation of both said publications "The Ladies Home Journal" and "The Country Gentleman," was also respectively very large and greatly extended and diffused throughout the United States and the several States ther-of, amounting in all to a circulation of about one and one-half million regularly distributed monthly for said "The Ladies Home Journal" and about two hundred thousand numbers regularly distributed each week for said "The Country Gentleman"; that all three said publications, and particularly the said "The Saturday Evening Post" were read by and reached a very important and well-to-do part of the general community throughout the United States and the several States thereof; that in the conduct and management of its said business in publishing said periodicals the said defendant held itself out at all times, and particularly at the time and place aforesaid, as ready and willing and desirous to take, receive, print publish and distribute in, by and through its said publications or periodicals hereinbefore named, advertisements from and of persons, firms and corporations of and concerning their business and occupations, or of and concerning articles offered by them
48 for sale or by them manufactured, or of and concerning the advantages derived by the public and the members ther-of, by and from dealing with such persons, firms and corporations so advertising in said periodicals and that the said defendant did in fact take and receive for publication and distribution in its said

periodicals, advertisements of the character and the kind above mentioned from such persons, firms and corporations; that in the course of said business the defendant dealt with the plaintiff and with many other advertising agencies similar to the plaintiff in the matter and manner and conduct of their business, and that the defendant did then and there recognize the various advertising agencies such as was then and there the plaintiff, as representatives and agents of the individual persons, firms and corporations whose business or goods or manufactures were then and there in due course of business sought to be advertised, and in the regular and due course of its business in owning, controlling, editing, publishing and distributing said publication dealt directly not only with the advertisers themselves but also with advertising agencies such as that owned, managed and conducted by the plaintiff; and that the facilities for advertising so afforded by the defendant through said publications became and were especially valuable to the plaintiff's said customers and to persons for whom the plaintiff acted and whom the plaintiff represented, in that said publications containing such advertisements reached and came to the attention of readers of and subscribers to the same, and to the knowledge and attention of persons interested in the advertisements therein contained, particularly of such readers and persons interested as were then and there and are now residents in the larger Cities of the United States, and that the business thus done with the plaintiff and its customers was a business constituting commerce among the several States, or
49 transactions of interstate commerce.

Plaintiff avers that the commercial business of the United States as between merchants and manufacturers doing business with each other and with persons of the public among the several States, is dependent in its operations, growth and development with reference particularly to modes of sale and distribution of goods and manufactures, upon the various advertising facilities offered by newspapers, journals, magazines and other periodicals, published, sold and distributed throughout the United States and the several States thereof; that such newspapers, journals, magazines, periodicals and other publications constitute the chief method of presenting to the purchasing public of the several States the articles, goods, merchandise and manufactures held out for sale by persons, firms and corporations such as the customers above mentioned of the plaintiff, for whom the plaintiff acted herein as agent or representative as aforesaid; that the advertising facilities so offered by such newspapers, journals, magazines and other periodicals, including the said periodicals published by the defendant, were at the time aforesaid and now are absolutely necessary to dealers, merchants and manufacturers such as the customers aforesaid of the plaintiff, so as to bring their articles, goods, merchandise and products to the notice and attention of the public; that the periodicals or publications above mentioned, owned, controlled, edited and published by the defendant, particularly that one known as "The Saturday Evening Post" have an important position or rank among a certain number of periodicals, magazines, journals, publications and other advertis-

ing mediums, which are intended to reach and be read by, and do in fact reach and are read by a large and constantly increasing portion of the public of the several States, who are ready and
50 desirous to purchase the articles, goods, merchandise and products so advertised; and that there has thus been formed and has grown up and was in existence at the time aforesaid a large body of persons to whom such magazines, periodicals and other publications, including said "The Saturday Evening Post," "The Ladies Home Journal" and "The Country Gentleman," come and by whom the same are read, and to whom at the times aforesaid came and by whom the same were read, and whose purchases of the goods, wares, merchandise and manufactures from the merchants, dealers and manufacturers such as and including the aforesaid customers of the plaintiff, for whom plaintiff acted and does act as agent or representative, are and were to a great and important extent, directed and influenced by the advertisements in such periodicals and publications, including the said publications of the said defendant; that the commercial and manufacturing business of the United States as it has grown up and developed among the several States and as it exists and is conducted at the present time, and as it existed and was conducted, at, to-wit, the time aforesaid, was essentially dependent upon opportunities and facilities for advertising in the various journals, periodicals and publications, such as the publications of the defendant; that the business and occupation of owning, controlling, managing, editing, publishing, selling and distributing such periodicals and other publications has become and is affected and was, to-wit, at the time aforesaid, affected with a public interest; so that there has arisen a duty and such duty now rests and is imposed by law upon the owners, editors and publishers of such periodicals to deal fairly and without unjust or undue discrimination with all such persons, firms and corporations, including the plaintiff, who may or might apply to the owners, editors or publishers of such periodicals and publications or to any of
51 them for the purpose of placing and having produced in such periodicals and publications, including the said publications of the defendant, advertisements of their goods and business, and of the products of their customers or persons, firms and corporations, for whom, as in the case of the plaintiff, a person, firm or corporation applying for such advertising space, acts as agent or representative.

Nevertheless, the said defendant not mindful of its said duties in the premises and with the unlawful and wrongful purpose and intention therein and thereby to injure the plaintiff in its business and occupation as aforesaid, has refused, to-wit, at the time aforesaid, and does still refuse without any reasonable ground, cause or pretense for such refusal, to accept proper and ordinary advertising matter or copy offered in the reasonable and usual way to the defendant by the plaintiff for printing and publication by the defendant in its magazines, periodicals and publications aforesaid, and particularly in the said "The Saturday Evening Post"; although the plaintiff did then and there tender such advertising matter in the usual

and ordinary way to the defendant and did then and there offer to pay to the said defendant the usual and regular sum or sums of money asked by the defendant for publication of advertising matter in its said publications.

And plaintiff avers that then and there on, to-wit, the first day of January, 1914, the said defendant refused to accept any advertising matter from the plaintiff, or to publish in its said periodicals and publications or any of them and particularly in the said "The Saturday Evening Post" any advertising matter of any kind offered to it by the plaintiff at any price whatsoever; and that at, to-wit, the same time and times upon which the said defendant as aforesaid refused to accept from the plaintiff and print and publish in

52 the said publications advertising matter tendered and offered to the defendant by the plaintiff, the said defendant did continuously in every issue, print and publish advertising matter of a similar character offered to it by persons, firms and corporations other than the plaintiff at its regular and usual rates for the same, to-wit, the same as tendered by the plaintiff as aforesaid and that the said defendant did then and there illegally, feloniously and wrongfully discriminate unjustly and unduly against the plaintiff, wherein and whereby the plaintiff did then and there lose the business of its said customers for whom it has been and was then and there acting as agent and representative in the placing of advertisements with the said publications of the defendant and was greatly mulcted in its business and affairs and was prevented from making further contracts with customers for the placing of their advertising matter in the said publications or in consequence thereof in any other publications of a like or similar character; and the business of the plaintiff was then and there greatly restrained and diminished, and the plaintiff was then and there injured in its business and property by and through the said wrongful acts of the defendant, to the loss and damage of the plaintiff in the sum of Twenty-five Thousand ($25,000.) Dollars.

By COLIN C. H. FYFFE,
IRA RYNER,
PAUL N. DALE,
Its Attorneys.

(Endorsed:) Filed August 28, 1914. T. C. MacMillan, Clerk.

53 And afterwards, to-wit, on the 5th day of September, 1914, comes the defendant, The Curtis Publishing Company by its attorneys and filed in the Clerk's office of said Court its certain Special Appearance and Motion to Dismiss in words and figures following, to-wit:

54 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Law. No. 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Special Appearance and Motion to Dismiss on Behalf of The Curtis Publishing Company, a Corporation.

And the Curtis Publishing Company, a corporation, defendant, by Miller, Gorham & Wales, its attorneys, comes and appears specially, limiting its appearance in said cause for the sole purpose of this motion only, and as to the first four counts of plaintiff's declaration and each of said counts, and the alleged causes of action therein stated, moves the court to set aside service of process in said cause, and to dismiss said suit for want of jurisdiction of the Court over this defendant upon the following grounds:

First. That in each of said counts it appears that the plaintiff is a citizen and resident of the State of Missouri, and this defendant is a resident and citizen of the State of Pennsylvania.

Second. That in none of said counts is a cause of action stated by plaintiff within the provisions of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

MILLER, GORHAM & WALES,
Attorneys for The Curtis Publishing Company, a Corporation, Appearing Specially and Limiting Its Appearance for the Sole Purpose of the Foregoing Motion.

(Endorsed:) Filed Sept. 5, 1914. T. C. MacMillan, Clerk.

55 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Law. No. 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Special Appearance and Motion to Dismiss on Behalf of The Curtis Publishing Company, a Corporation.

And The Curtis Publishing Company, a corporation defendant, by Miller, Gorham & Wales, its attorneys, comes and appears specially, limiting its appearance in said cause for the sole purpose of this motion only, and as to the fifth count of plaintiff's declaration, and the alleged cause of action therein stated, moves the Court to set aside service of process in said cause, and to dismiss said suit for want of jurisdiction of the Court over this defendant upon the following grounds:

First. That in said count it appears that the plaintiff is a citizen and resident of the State of Missouri, and this defendant is a resident and citizen of the State of Pennsylvania.

MILLER, GORHAM & WALES,
Attorneys for The Curtis Publishing Company, a Corporation, Appearing Specially and Limiting Its Appearance for the Sole Purpose of the Foregoing Motion.

(Endorsed:) Filed Sept. 5, 1914. T. C. MacMillan, Clerk.

56 And afterwards, to-wit: on the 31st day of May, 1916, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to-wit:

31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY

vs.

CURTIS PUBLISHING COMPANY and WILLIAM BOYD.

Upon motion of the plaintiff, it is ordered by the Court that the defendants' motion to quash service of summons and to dismiss this cause be and the same is hereby set for hearing on June 15.

57 And afterwards, to-wit: on the second day of May, 1917, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to-wit:

31767.

BLUMENSTOCK BROS. ADVERTISING AGENCY

vs.

CURTIS PUBLISHING COMPANY and WILLIAM BOYD.

Now come the parties by their attorneys and now this day comes on to be heard the motion of the defendant to dismiss the above entitled cause. It is ordered by the Court that said motion be submitted on briefs to be filed.

57½ And afterwards, to-wit: on the 8th day of June, 1918, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to-wit:

31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

This cause coming on to be heard upon the motion of the attorneys for the plaintiff for leave to file an additional count to the declaration; and the Court having heard arguments and being advised in the premises, it is ordered that leave be and the same hereby is granted to the plaintiff to file an additional count to its said declaration heretofore filed herein.

58 And on to-wit: the 8th day of June, 1918, come the plaintiff herein by its attorneys and filed in the Clerk's office of said Court its certain Additional Count to Declaration in words and figures following, to-wit:

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

In the District Court of the United States, Northern District of Illinois, Eastern Division, June Term, 1918.

In Law. No. 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Blumenstock Brothers Advertising Agency, a corporation organized and existing under and by virtue of the laws of the State of Missouri, by leave of Court first had and obtained files this its additional count to the declaration and complains of the Curtis Publishing Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania:

For that whereas, on, to-wit, the first day of January, 1914, at to-wit, Chicago, in the County of Cook and State of Illinois, plaintiff was a corporation of Missouri as aforesaid and engaged in the business and occupation of conducting an advertising agency, in which said business or occupation the plaintiff acted for and represented various and sundry customers or principals in the following manner: When such customers or principals were desirous of placing in and having distributed through magazines and periodicals, advertisements of their respective businesses, they would make the plaintiff their agent therein and the plaintiff would contract with the defendants and other publishers and distributors of magazines and periodicals for the publication in and distribution of advertising matter prepared by the plaintiff throughout the United States and the several States thereof. The plaintiff avers that it had many customers of such kind, and that it placed the advertisements of such customers with the periodicals published and distributed by the defendant, and with other journals, periodicals, magazines and publications owned, published and distributed by persons or corporations other than the defendant, all of which journals, periodicals, magazines and publications were so published and distributed throughout the United States and the several States thereof. The plaintiff further avers that there accrued to it great rewards, recompense, commissions and other returns for the time and labor expended by the plaintiff in and about its said business, of placing with the publications of the defendant and the other journals, periodicals, magazines and publications the said advertising matter, for the purpose of having said advertising matter distributed throughout the United States and the several States thereof.

Plaintiff avers that the defendant, The Curtis Publishing Com-

pany, was then and there a corporation of Pennsylvania as aforesaid, and was the owner, in control of and then and there published, sold and distributed throughout the United States and the several States thereof great quantities of certain publications or periodicals or magazines known as, to-wit, "The Saturday Evening Post," "The Ladies' Home Journal," and "The Country Gentleman."

61 That said business in which the defendant was engaged of publishing, selling and distributing such publications, periodicals or magazines throughout the United States and the several States thereof constitutes commerce among the States or interstate commerce. That "The Saturday Evening Post" was then and there and still is a weekly illustrated publication, circulated and distributed in vast quantities throughout the United States and the several States thereof. That the circulation of said "The Saturday Evening Post" aggregated a vast number of copies distributed throughout the United States and the several States thereof, at, to-wit, the place and time aforesaid, amounting to the number of between one and one-half million and two million copies for each week's issue of the said "The Saturday Evening Post." That said publication known as "The Saturday Evening Post" so owned, controlled, edited, published and distributed throughout the United States and the several States thereof, contained in each weekly publication a great number of articles, essays, stories, serial novels, comments on matters of literary, commercial, political and general interest, and especially a very large amount of advertising and advertising matter of great interest to the readers, purchasers of and subscribers to the same throughout the United States and in the several States thereof. That the said advertising matter constitutes a large part of all the matter contained in said "The Saturday Evening Post." That the said "The Ladies Home Journal" was at the time aforesaid and now is published, issued, and distributed throughout the United States and the several States thereof by the defendant monthly, and the said "The

62 Country Gentleman" weekly. That the circulation of both said publications "The Ladies Home Journal" and "The Country Gentleman" was also respectively very large and greatly extended and diffused throughout the United States and the several States thereof, amounting in all to a circulation of about one and one-half million copies *and* the said "The Ladies Home Journal" distributed by the defendant monthly, throughout the United States and the several States thereof, and about two hundred thousand copies of the said "The Country Gentleman" regularly distributed each week throughout the United States and the several States thereof. That in the conduct and management of its business in publishing and distributing throughout the United States and the several States thereof said periodicals, the said defendant held itself out at all times, and particularly at the time and place aforesaid, as ready, willing and desirous to take, receive, print, publish and distribute throughout the United States and the several States thereof, in, by and through its said publications or periodicals hereinbefore mentioned, advertisements from any and all persons, firms and corporations of and concerning their businesses and occupations, or of

and concerning articles offered for sale by them or by them manufactured, or of and concerning the advantages derived and to be derived by the public and the members thereof by and from dealing with such persons, firms and corporations so advertising in said periodicals. And that the said defendant did, in fact, take and receive for publication and distribution throughout the United States and the several States thereof in its said periodicals advertisements of the character and kind above mentioned from such per-
63 sons, firms and corporations. That in the course of said business the defendant dealt with the plaintiff and with many other advertising agencies similar to the plaintiff in the matter and manner and conduct of their business by contracting for the publication and distribution throughout the United States and the several States thereof of advertising matter, and that the defendant did then and there recognize the various advertising agencies such as was then and there the plaintiff as representatives and agents of the individual persons, firms and corporations whose business or goods or manufactures were then and there in the due course of business sought to be advertised through the publication and distribution throughout the United States and the several States thereof of such advertising matter in the publications owned, controlled, edited, published and distributed throughout the United States and the several States thereof by the said defendant, and in the regular and due course of its business in owning, controlling, editing, publishing and distributing throughout the United States and the several States thereof, said publications dealt directly not only with the advertisers themselves, but also with advertising agencies, such as that owned, managed and conducted by the plaintiff and that all of such dealings and transactions between the defendant and advertising agencies were transactions of interstate commerce and constituted commerce among the several States. That the facilities for advertising so afforded by the defendant through said publishing and distribution throughout the United States and the several States thereof of said publications containing said advertising matter became and were especially valuable and necessary to the plaintiff's said customers and to persons for whom the plaintiff acted and whom the
64 plaintiff represented, in that said publications containing such advertisements were distributed by the defendant throughout the United States and the several States thereof, and reached and came to the attention of readers and subscribers to the same, and to the knowledge and attention of persons throughout the United States and the several States thereof interested in the advertisements therein contained, particularly of such readers and persons interested as were then and there and are now residents in the larger cities of the several States of the Unitd States, and that the business done by the defendant with the plaintiff and its customers and with other advertising agencies and advertisers, that is, the business of editing, publishing and distributing throughout the United States and the several States thereof of vast quantities of said advertising matter pursuant to contracts made with the plaintiff, its

customers, other advertising agencies and advertisers, and the making of such contracts constituted commerce among the several States or transactions of interstate commerce.

Plaintiff avers that commerce in the United States and in and between the several States thereof, as between merchants and manufacturers doing business with each other and with persons of the public throughout the several States of the United States, is dependent in its operations, growth and development, with reference particularly to modes of sale and distribution of goods and manufactures, upon the various advertising facilities offered by newspapers, journals, magazines and other periodicals such as those of the defendant, which are published, sold and distributed throughout the United States and the several States thereof. That such newspapers, journals, magazines, periodicals and other publications constitute
65 the chief method of presenting to the purchasing public of the United States and the several States thereof, articles, goods, merchandise and manufactures held out for sale by persons, firms and corporations such as were the customers above mentioned of the plaintiff, and of the other like advertising agencies for whom the plaintiff and such other agencies acted as agent or representative in securing the distribution of advertising matter throughout the United States and the several States thereof in the manner described above. That the advertising facilities so offered by such newspapers, journals, magazines and other periodicals, including the said periodicals published by the defendant, were at the time aforesaid necessary to dealers, merchants and manufacturers such as the customers aforesaid of the plaintiff and such other agencies, so as to bring their articles, goods, merchandise and products to the notice and attention of prospective purchasers throughout the United States and the several States thereof. That the periodicals or publications above mentioned owned, controlled, edited, published and distributed throughout the United States and the several States thereof by defendant, particularly that one known as "The Saturday Evening Post," have an important position or rank among a certain number of periodicals, magazines, journals, publications and other advertising mediums which are intended to reach and be read by and are distributed to, and do, in fact, reach and are read by a large and constantly increasing portion of the public throughout the United States and the several States thereof, who are ready and desirous to purchase the articles, goods, merchandise and products so advertised.

That the said "The Saturday Evening Post" holds in the field of periodicals of its type a predominant and preponderant position, and that for that reason it is the most necessary of any such
66 advertising mediums to persons, firms and corporations such as the customers above mentioned of the plaintiff; that there has thus been formed and has grown up and was in existence at the time aforesaid a large body of persons throughout the United States and the several States thereof to whom such magazines, periodicals and other publications, including the "The Ladies Home Journal" and "The Country Gentleman," and especially "The Saturday Evening Post," came and by whom the same were read, and whose pur-

chase of the goods, wares, merchandise and manufactures from the merchants, dealers and manufactures such as and including the aforesaid customers of the plaintiff for whom the plaintiff acted as agent or representative, were, to a great and important extent, directed and influenced by the advertisements of such periodicals and publications, including the said publications of the said defendant and especially the said "The Saturday Evening Post," which at said time held a predominant position in the field of advertising herein described and which carried a preponderating amount of certain classes of advertising matter, including the advertisements of the goods, wares, merchandise and manufacturers of the aforesaid customers of the plaintiff and of the said other advertising agencies above mentioned. That the commerce of the United States, as it has grown up and developed throughout the United States and the several States thereof, and as it existed and was conducted at, to-wit, the time aforesaid, was essentially dependent upon opportunities and facilities for advertising in the varous journals, periodicals and publications of the kind mentioned, especially that publication of the defendant, "The Saturday Evening Post," which as aforesaid
67 held a controlling and dominating position among the mediums of advertising of its own class, and which stood therefor- as an essential medium of advertising throughout the United States and the several States thereof, on which merchants, dealers and manufacturers of certain lines of goods, wares, merchandise and manufacturers, including some of the aforesaid customers of the plaintiff, were necessarily dependent.

That the said magazine, journals and periodicals owned and published by the defendant, together with certain other magazines, periodicals and other publications owned and published by other persons than the defendant, had, to a great extent, the exclusive control of a certain field of advertising, including a more or less limited number of advertisers of certain classes of goods, wares, merchandise and manufacturers, but which field of advertising was of great pecuniary value to such publications and their owners, and to advertising agencies such as was the plaintiff. That such magazines, periodicals and other publications which control and do all the advertising business of the field of advertising in question are few in number and are owned, managed and published by a small group of firms and corporations; that for the advertising of the business, articles, goods, merchandise and products offered for sale or offered by and through some means of commerce by the persons so advertising, including therein the customers aforesaid of the plaintiff, and of such other advertising agencies there were at, to-wit, the time aforesaid, no adequate opportunities or facilities for advertising such business and goods except those offered through and by the publications of the de-
68 fendant and the other publishers above mentioned of similar magazines and periodicals, but particularly of the defendant since its publication, the "The Saturday Evening Post" held and was recognized as holding a unique position as a medium of advertising on account of its predominant position in its field of publications, due to its wide circulation and distribution throughout the United

States and the several States thereof. That the defendant at the time aforesaid had control of a large proportion of the advertising business offered to such periodicals and other publications for the purpose of having it published and distributed throughout the United States and the several States thereof. That on account of its preponderant position the rates for advertising asked and received by the defendant in its said publications and particularly in said "The Saturday Evening Post" were at the time aforesaid much higher than the rates for such advertising asked by the owners of other periodicals and publications of the same class as the defendant, covering the same restricted field of advertising and being distributed over practically the same geographical area. That the defendant then and there was desirous of using its preponderant position in this special field of advertising as a means of acquiring and gaining for itself and for its said publications, especially for the "The Saturday Evening Post," a monopoly in the publication and distribution of advertising matter in this restricted field of advertising throughout the United States and the several States thereof, contrary to and in violation of the provisions of the Act of Congress, approved July 2, 1890, entitled "An Act to protect Trade and Commerce against unlawful restraint and monopolies;" and with intent to injure the property and the business of the plaintiff by means which are forbidden and de-
69 clared to be unlawful by said Act of Congress, the defendant did then and there refuse, and since then hitherto has refused, without any reasonable cause or pretense for such refusal, to accept proper and ordinary advertising matter or copy offered in the reasonable and usual way to the defendant by the plaintiff and other advertising agencies, for the printing and publication and distribution throughout the United States and the several States thereof by the defendant, in and by its said periodicals or publications aforesaid, and particularly in the said "The Saturday Evening Post," which as the defendant knew, stood in a preponderant position in the field of advertising above described and was absolutely necessary as an advertising medium to the said customers of the plaintiff, and was therefore absolutely necessary to the prosperity and, in fact, the continuance of the said plaintiff's business as an advertising agency.

Although the plaintiff and such other advertising agencies did then and there tender such advertising matter in the usual and ordinary way to the defendant, and did then and there offer to pay to the said defendant the usual and regular sum or sums of money asked by the defendant for the publication and distribution of advertising matter in said publications, the defendant so refused and has continued so to refuse to accept or publish such advertisements offered to it by the plaintiff and such other agencies on behalf of their said customers, unless the plaintiff and such other advertising agencies agreed to allow the defendant to increase its preponderance in said advertising field, and increase its control of the said advertising field by permitting the defendant to control and to limit and reduce at the arbitrary will of the defendant the amount of advertising
70 given by the plaintiff and such other advertising agencies to the owners or publishers of the other magazines, journals,

periodicals and other publications aforesaid which were attempting to compete with the defendant for and in the field of advertising above mentioned and described.

By means of each and all said illegal and wrongful acts so wrongfully and illegally done by the defendant in pursuance of its objects, attempt and scheme then and there to create a monopoly for its own benefit, in, and to monopolize the said advertising business hereinbefore described, the plaintiff did then and there lose the business of its said customers for whom it had been and was then and there acting as agent and representative in the placing of advertisements with the said publications of the defendant and said other publications, and was prevented from making further contracts with customers in said lines of advertising business for the placing of their advertising matter in the said publications of the defendant and in consequence thereof in any other publications of a like or similar character; and the business of the plaintiff was therein and thereby greatly restrained and diminished and the plaintiff was then and there injured in its business and property by and through the said wrongful and illegal acts of the defendant in its said attempt to monopolize the said advertising business, which acts are declared to be unlawful by said Act of Congress of July 2, 1890; to the loss and damage of the plaintiff in the sum of Twenty-five Thousand ($25,000) Dollars, to recover three-fold which damages under Section 7 of said Act this suit is brought.

COLIN C. H. FYFFE,
IRA RYNER AND
PAUL N. DALE,
Attorneys for Plaintiff.

(Endorsed:) Filed June 8, 1918. T. C. MacMillan, Clerk.

71 And on to-wit: the 8th day of June, 1918, come the defendant herein by its attorneys and filed in the Clerk's office of said Court its certain Special Appearance and Motion to Dismiss in words and figures following, to-wit:

72 UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division; ss:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Law. No. 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Special Appearance and Motion to Dismiss on Behalf of The Curtis Publishing Company, a Corporation.

The Curtis Publishing Company, a corporation, defendant, by Miller, Gorham & Wales, its attorneys, comes and appears specially, limiting its appearance in said cause for the sole purpose of this motion only, and moves the Court to set aside service of process in said cause and to dismiss said suit for want of jurisdiction of the Court over this defendant, upon the following grounds:

1. That in each of the counts of plaintiff's original declaration, and in the additional count thereof, it appears that the plaintiff is a citizen and resident of the State of Missouri, and that this defendant is a citizen and resident of the State of Pennsylvania.

2. That in none of said counts is a cause of action stated by plaintiff within the provisions of the Act of Congress approved July 2nd, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies."

MILLER, GORHAM & WALES,
Attorneys for The Curtis Publishing Company, a Corporation, Appearing Specially and Limiting Its Appearance for the Sole Purpose of the Foregoing Motion.

(Endorsed:) Filed June 8, 1917. T. C. MacMillan, Clerk.

73 And again, to-wit: the 8th day of June, 1918, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to-wit:

74 UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Law. No. 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation.

And the defendant, The Curtis Publishing Company, having heretofore appeared specially for the sole purpose of moving the court to set aside service of process in the above entitled cause and to dismiss said suit for want of jurisdiction of the court over said defendant, and now on this day said motion coming on to be heard, and the Court having considered the same and now being fully advised, finds that this court has no jurisdiction over said defendant and no jurisdiction to entertain this action.

It is, therefore, ordered, adjudged and decreed that the service of process in the above entitled cause be and the same is hereby set aside, and that this cause be and the same is hereby dismissed for want of jurisdiction.

Enter, June 8th, 1918.

CARPENTER, *Judge.*

75 And on to-wit: the 21st day of June, 1918, there was filed in the Clerk's office of said Court a certain Bill of Exceptions in words and figures following, to-wit:

76 UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Law. No. 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation.

Bill of Exceptions.

Be it remembered that heretofore, to-wit, on the 8th day of June, A. D. 1918, the defendant filed in the above entitled cause its written

appearance and motion, which said appearance and motion is as follows:

"The Curtis Publishing Company, a corporation, defendant, by Miller, Gorham & Wales, its attorneys, comes and appears specially, limiting its appearance in said cause for the sole purpose of this motion only, and moves the Court to set aside service of process in said cause and to dismiss said suit for want of jurisdiction of the court over this defendant, upon the following grounds:

1. That in each of the counts of plaintiff's original declaration, and in the additional count thereof, it appears that the plaintiff is a citizen and resident of the State of Missouri, and that this defendant is a citizen of the State of Pennsylvania.

2. That in none of said counts is a cause of action stated by plaintiff within the provisions of the Act of Congress approved July 2nd 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.'

MILLER, GORHAM AND WALES,
Attorneys for The Curtis Publishing Company, a Corporation, Appearing Specially and Limiting Its Appearance for the Sole Purpose of the Foregoing Motion."

Thereupon, on the same day, namely, June 8, A. D. 1918, before the Honorable George A. Carpenter, one of the Judges of this Court, this cause came on to be heard on said written motion and appearance.

There was no evidence offered by either of the parties to said cause or considered by the Court in hearing and passing upon said motion.

And thereupon the Court sustained said motion of the defendant and entered an order finding that it had no jurisdiction of said cause and setting aside the service of process therein and dis-
77 missing said cause for want of jurisdiction.

To which ruling and decision of the Court in sustaining said motion and finding that it had no jurisdiction of said cause and in setting aside the service of process therein and dismissing said cause for want of jurisdiction, the plaintiff by its attorneys then and there duly excepted.

And because the matters aforesaid do not fully appear of record the plaintiff presents this, its bill of exceptions, and prays that the same may be signed and sealed by the Judge of this Court, which is accordingly done this 21st day of June, A. D. 1918.

GEORGE A. CARPENTER,
Judge District Court.

(Endorsed:) Filed June 21, 1918. T. C. MacMillan, Clerk.

78 And afterwards to-wit: — the 29th day of June, 1918, there was filed in the Clerk's office of said Court a certain Certificate in words and figures following, to-wit:

79 UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Law. No. 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Certificate.

This cause coming on to be heard upon the motion of the plaintiff for a certificate by the Court that the said cause was dismissed for want of jurisdiction and the Court being advised in the premises, the Court does now hereby certify that on the 8th day of June, A. D. 1918, an order was entered herein by this Court wherein and whereby this Court found that the Court had no jurisdiction over said defendant and no jurisdiction to entertain said action, and it was therefore ordered, adjudged and decreed by this Court that the service of process in the above entitled cause be and the same was thereby set aside and that the cause be and the same was thereby dismissed for want of jurisdiction and the Court does hereby certify to the Supreme Court of the United States pursuant to the statute in such case made and provided the question whether this Court
80 had jurisdiction over the said defendant and the said cause. And the Court further certifies that the question of jurisdiction involved is whether the transactions set forth in the several counts of the said declaration involve a question of interstate commerce and whether the averments in said several counts in the said declaration contained state a cause of action within the provisions of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

GEO. A. CARPENTER,
Dist. Judge.

29 June, 1918.

(Endorsed:) Filed June 29, 1918. T. C. MacMillan, Clerk.

81 And afterwards to-wit: the 29th day of July, 1918, come the plaintiff herein by its attorneys and filed in the Clerk's office of said Court its certain Petition for Writ of Error in words and figures following, to-wit:

82 In the District Court of the United States, Northern District of Illinois, Eastern Division.

In Law. Number 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Petition for Writ of Error.

Your petitioner, Blumenstock Brothers Advertising Agency, the plaintiff in the above entitled cause, respectfully represents to your Honor that there is manifest error committed to the injury of the petitioner by the final judgment made and entered in the above entitled cause on the 8th day of June, A. D. 1918, in and by which said final judgment this Court refused jurisdiction of the cause set forth in your petitioner's declaration, on the ground that this cause was and is not a case arising under the Act of Congress approved July 2, 1890, entitled "An Act to protect Trade and Commerce against unlaw- restraints and monopolies," common- known as the Sherman Anti-Trust Act, and that in and by said judgment the Court found that this Court had no jurisdiction over the said defendant, The Curtis Publishing Company, and that it had no
83 jurisdiction to entertain said action; and in and by said judgment the Court ordered, adjudged and decreed that the service of process in said cause be and the same was thereby set aside, and that the cause be and the same was thereby dismissed for want of jurisdiction; and your petitioner respectfully represents that there is manifest error committed to the injury of your petitioner in and by said judgment in this that the Court, although requested thereto, refused to find that there was alleged in the said declaration and the several counts thereof a question of interstate commerce, and that the Court, although requested thereto, refused to and did not find that the averments in the said several counts in the said declaration stated a cause of action within the provisions of the said Act of Congress approved July 2, 1890, entitled "An Act to protect Trade and Commerce against unlawful restraints and monopolies."

Wherefore your petitioner, Blumenstock Brothers Advertising Agency, a corporation, considering itself aggrieved, prays that a writ of error issue from said final judgment of the District Court direct to the Supreme Court of the United States as authorized by Section 238 of the Judicial Code of the United States in force January 1, 1912, and your petitioner prays this Honorable Court that this writ of error be allowed and that a transcript of so much of the records, proceedings and papers upon which said judgment was made as may

be necessary to present the said question of jurisdiction, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner herewith presents its assignment of errors as required by law.

Your petitioner herewith files and offers its bond in the
84 penal sum of Three hundred and No/100 Dollars ($300.00), and asks that the same be approved and that writ of error be allowed.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY,
By COLIN C. H. FYFFE,
Attorney for Plaintiff.

(Endorsed:) Filed July 29, 1918. T. C. MacMillan, Clerk.

85 And again to-wit, the 29th day of July, 1918, come the plaintiff herein by its attorneys and filed in the Clerk's office of said Court its certain Assignment of Errors in words and figures following, to-wit:

86 UNITED STATES OF AMERICA,
Supreme Court of the United States, ss:

In the Supreme Court of the United States of America.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff in Error,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant in Error.

Assignment of Errors.

1. The District Court of the United States for the Northern District of Illinois, Eastern Division, erred in entering the order of June 8, 1918, wherein and whereby the said Court set aside the service of process in the above entitled cause and dismissed said suit for want of jurisdiction of the Court over the said defendant in error, and in finding that the Court had no jurisdiction over said defendant in error and no jurisdiction to entertain the said action.

2. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in said order in that it dismissed said suit for want of jurisdiction of the Court over said defendant in error.

3. The said District Court of the United States for the
87 Northern District of Illinois, Eastern Division, erred in that it found in and by said order that said Court had no jurisdiction over said defendant in error.

4. The said District Court of the United States for the Northern

District of Illinois, Eastern Division, erred in said order in that it found therein that it had no jurisdiction to entertain the said action.

5. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in entering the said order in that it therein ordered, adjudged and decreed that the service of process in the above entitled cause be and the same was thereby set aside.

6. The District Court of the United States for the Northern District of Illinois, Eastern Division, erred in the entry of said order in that it thereby ordered, adjudged and decreed that the said cause be and the same was thereby dismissed for want of jurisdiction.

7. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in that it sustained the motion of the said defendant in error to set aside the service of process in said cause and to dismiss said suit for want of jurisdiction.

8. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in that it granted the motion of the said defendant in error to set aside the service of process in said cause.

9. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in that it granted the motion of the said defendant in error to dismiss said suit for want of jurisdiction of the Court over the said defendant in error.

88 10. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in that it did not overrule the said motion of the defendant in error to set aside service of process in said cause and to dismiss said suit for want of jurisdiction over the said defendant in error.

11. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in holding in accordance with said motion of the defendant in error that in none of the counts of the plaintiff's original declaration, nor in the additional count thereof, was a cause of action stated by plaintiff in error within the provisions of the Act of Congress approved July 2, 1890, entitled "An Act to protect Trade and Commerce against unlawful restraints and monopolies."

By COLIN C. H. FYFFE,
IRA RYNER,
PAUL M. DALE,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed July 29, 1918. T. C. MacMillan, Clerk.

89 And, to-wit: on the 29th day of July, 1918, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to-wit.

90 In the District Court of the United States, Northern District of Illinois, Eastern Division.

In Law. Number 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation,

vs.

THE CURTIS PUBLISHING COMPANY.

Upon motion of Colin C. H. Fyffe, Ira Ryner and Paul N. Dale, attorneys for plaintiff, and upon filing a petition for a writ of error and an assignment of errors and having given proper security, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein and that the bond on said writ of error presented by said plaintiff be and hereby is approved.

Enter:

K. M. L., *Judge.*

91 And on to-wit: the 29th day of July, 1918, come Blumenstock Brothers Advertising Agency, a corp., as principal and United States Fidelity & Guaranty Co., as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Writ of Error in words and figures following, to-wit.

92 Know all men by these presents, That we, Blumenstock Brothers Advertising Agency, a corporation, as principal, and The United States Fidelity & Guaranty Co., a corporation, as sureties, are held and firmly bound unto The Curtis Publishing Company, a corporation, in the full and just sum of Three hundred and No. /100 dollars ($300.00) to be paid to the said The Curtis Publishing Company, a corporation, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of July in the year of our Lord one thousand nine hundred and Eighteen (1918.)

Whereas, lately at a Session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit depending in said Court, between Blumenstock Brothers Advertising Agency, a corporation, Plaintiff, and The Curtis Publishing Company, a corporation, defendant, a judgment was rendered against the said Blumenstock Brothers Advertising Agency a corporation, and the said Blumenstock Brothers Advertising Agency, a corporation, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Curtis Publishing Company, a corporation, citing and admonishing it to be and

appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, That if the said Blumenstock Brothers Advertising Agency, a corporation, shall prosecute its writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, [SEAL.]
By GEO. BLUMENSTOCK. [SEAL.]
UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
[SEAL.] By FRANK J. GAUTLER,
Attorney in Fact.

Approved by—
K. M. L.

(Endorsed:) Filed July 29, 1918, T. C. MacMillan, Clerk.

93 [Endorsed:] In law, No. 31767. United States Circuit Court, Northern Dist. of Illinois, Eastern Division. Blumenstock Brothers Advertising Agency, a corp., Plaintiff in Error, vs. The Curtis Publishing Company, a corp., Defendant in Error. Bond Supreme Court.

94 In the District Court of the United States, Northern District of Illinois, Eastern Division.

In Law. Number 31767.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Præcipe.

The Clerk of the said Court will incorporate into the transcript of the record on the writ of error granted to the United States Supreme Court in the above entitled cause the following papers: Præcipe, security for costs, summons, appearance of plaintiff, return on service of summons, declaration, special appearance and motion to dismiss on behalf of The Curtis Publishing Company, order motion to quash set for June 15, order motion to dismiss be submitted on briefs, order granting leave to the plaintiff to file an additional count to the declaration, additional count to the declaration, special appearance and motion to dismiss on behalf of The Curtis Publishing Com-

pany, order that the service of process be set aside and that the cause be dismissed for want of jurisdiction and judgment to the same effect, order taxing costs, order approving bill of exceptions, bill of exceptions, certificate to the Supreme Court of jurisdictional question, petition for order allowing writ of error, assignment
95 of errors, order allowing writ of error and approving bond, writ of error, bond on writ of error, citation and proof of service of same, this præcipe and proof of service of same.

COLIN C. H. FYFFE,
IRA RYNER,
PAUL N. DALE,
Attorneys for Plaintiff.

96 STATE OF ILLINOIS,
County of Cook, ss:

Dave R. Clarke, being first duly sworn on oath deposes and says, that he is an employe in the office of Colin C. H. Fyffe, Ira Ryner and Paul N. Dale, attorneys for the plaintiff in error in the above entitled cause, and that he served a copy of the foregoing præcipe on Miller, Gorham and Wales, attorneys for the defendant in error by handing to Amos C. Miller one of the said attorneys such copy at 3:07 o'clock P. M. on Wednesday, the 31st day of July, A. D. 1918.

DAVE R. CLARKE.

Subscribed and sworn to before me this 31st day of July, A. D. 1918.

[SEAL.] IRENE BOURQUE,
Notary Public.

(Endorsed:) Filed Aug. 1, 1918. T. C. MacMillan, Clerk.

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Blumenstock Brothers Advertising Agency, a corporation, and The Curtis Publishing Company, a corporation, a manifest error hath happened, to the great damage of the said Blumenstock Brothers Advertising Agency, a corporation, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so t[illegible] t you have the same in the

said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of July, in the year of our Lord one thousand nine hundred and eighteen.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MacMILLAN,
Clerk of the District Court of the United States for the Northern Dist. of Illinois.

Allowed by
KENESAW M. LANDIS, *Judge.*

98 [Endorsed:] 31767. Supreme Court of the United States. Blumenstock Bros. Adv. Agency *vs.* The Curtis Pub. Co. Writ of Error. Copy deposited for the defendant in error in the Clerk's Office, U. S. Circuit Court, Northern District of Illinois.

99 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled Blumenstock Brothers Advertising Agency, a corporation, plaintiff, versus The Curtis Publishing Company, a corporation, No. 31767, as the same appear from the original records and files thereof, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 21st day of August A. D. 1918.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MacMILLAN, *Clerk.*

100 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Curtis Publishing Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to Writ of Error filed in

the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Blumenstock Brothers Advertising Agency, a corporation, is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Kennesaw M. Landis, Judge of the District Court of the United States, this 30th day of July, in the year of our Lord one thousand nine hundred and eighteen.

KENESAW M. LANDIS.

101 On this 31st day of July, in the year of our Lord one thousand nine hundred and eighteen, personally appeared Dave R. Clarke before me, the subscriber, and said that he was an employee in the office of Colin C. H. Fyffe, Ira Ryner & Paul N. Dale attorneys for the plaintiff in error in the above entitled cause and makes oath that he delivered a true copy of the within citation to Amos C. Miller a member of the firm of Miller, Gorham & Wales attorneys for the defendant in error in the above entitled cause at 3:07 P. M. July 31, A. D. 1918.

Sworn to and subscribed the 1st day of August A. D. 1918.

[Seal Irene Bourque, Notary Public, Cook County, Ill.]

IRENE BOURQUE.

[Endorsed:] No. 31767. Supreme Court of the United States. Blumenstock Brothers Advertising Agency, plaintiff in error, vs. The Curtis Publishing Company, defendant in error. Citation to the Supreme Court of the United States. Filed Aug. 1, 1918, at — o'clock — M. T. C. MacMillan, Clerk. Colin C. H. Fyffe, Atty. for Plaintiff.

102 UNITED STATES OF AMERICA,
Supreme Court of the United States, ss:

In the Supreme Court of the United States of America.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY, a Corporation, Plaintiff in Error,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation, Defendant in Error.

Assignment of Errors.

1. The District Court of the United States for the Northern District of Illinois, Eastern Division, erred in entering the order of June 8, 1918, wherein and whereby the said Court set aside the service of

process in the above entitled cause and dismissed said suit for want of jurisdiction of the Court over the said defendant in error, and in finding that the Court had no jurisdiction over said defendant in error and no jurisdiction to entertain the said action.

2. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in said order in that it dismissed said suit for want of jurisdiction of the Court over said defendant in error.

3. The said District Court of the United States for the
103 Northern District of Illinois, Eastern Division, erred in that it found in and by said order that said Court had no jurisdiction over said defendant in error.

4. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in said order in that it found therein that it had no jurisdiction to entertain the said action.

5. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in entering the said order in that it therein ordered, adjudged and decreed that the service of process in the above entitled cause be and the same was thereby set aside.

6. The District Court of the United States for the Northern District of Illinois, Eastern Division, erred in the entry of said order in that it thereby ordered, adjudged and decreed that the said cause be and the same was thereby dismissed for want of jurisdiction.

7. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in that it sustained the motion of the said defendant in error to set aside the service of process in said cause and to dismiss said suit for want of jurisdiction.

8. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in that it granted the motion of the said defendant in error to set aside the service of process in said cause.

9. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in that it granted the motion of the said defendant in error to dismiss said suit for want of jurisdiction of the Court over the said defendant in error.

104 10. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in that it did not overrule the said motion of the defendant in error to set aside service of process in said cause and to dismiss said suit for want of jurisdiction over the said defendant in error.

11. The said District Court of the United States for the Northern District of Illinois, Eastern Division, erred in holding in accordance with said motion of the defendant in error that in none of the counts of the plaintiff's original declaration, nor in the additional count thereof, was a cause of action stated by plaintiff in error within the provisions of the Act of Congress approved July 2, 1890, entitled "An Act to protect Trade and Commerce against unlawful restraints and monopolies."

Wherefore the said plaintiff in error prays that the judgment of the said Court be in all things reversed.

COLIN C. H. FYFFE,
IRA RYNER,
PAUL N. DALE,
Attorneys for Plaintiff in Error.

Endorsed on cover: File No. 26724. N. Illinois D. C. U. S. Term No. 638. Blumenstock Brothers Advertising Agency, plaintiff in error, vs. The Curtis Publishing Company. Filed August 26th, 1918. File No. 26724.

DEC 30 1919
JAMES D. MAHER,
CLERK.

197

No. [illegible] (26724)

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY,
Plaintiff in Error,

vs.

THE CURTIS PUBLISHING COMPANY,
Defendant in Error.

In Error to the District Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR BLUMENSTOCK BROTHERS ADVERTISING AGENCY.

COLIN C. H. FYFFE,
PAUL N. DALE,
DAVID R. CLARKE,
Attorneys for Plaintiff in Error.

BARNARD & MILLER PRINT, CHICAGO.

INDEX.

PAGE

STATEMENT OF THE CASE..... 1-4

SPECIFICATION OF ERRORS RELIED UPON.. 5-6

ARGUMENT:

The District Court had jurisdiction to entertain this suit.

I. The motion of the defendant in error to dismiss the suit for want of jurisdiction was intended to raise a question of the sufficiency of the allegations of the declaration. This does not involve a question of jurisdiction under section 238 of the Judicial Code..... 7-10

II. The only question upon the motion, the judgment and the certificate of the court, is the question which must always arise—whether the allegations of the declaration and the contention that they raise real questions of the interpretation and application of the Sherman Act, are frivolous.....10-14

(a) The Certificate of the District Court to this Court raised no true question of jurisdiction 7

(b) The motion filed in the District Court raised no true question of jurisdiction 8-10

PAGE

(c) The question before this Court is whether the allegations of the declaration and the contention that they raise real questions of the interpretation and application of the Sherman Act, are frivolous.....10-14

Louisville & Nashville R. R. Co. v. *Rice,* 247 U. S. 201, 203.

The Fair v. *Kohler Die Co.,* 228 U. S. 22, 25.

Public Service Co. v. *Corboy,* 250 U. S. 153.

Boston Store v. *American Graphophone Co.,* 246 U. S. 8.

Odell v. *Farnsworth Co.,* 250 U. S. 501.

Pratt v. *Paris Gas Light & Coke Co.,* 168 U. S. 255, 259.

Sutton v. *English,* 246 U. S. 199.

Berkman v. *U. S.,* 250 U. S. 114.

III. The first four counts and the additional count of the declaration present a substantial controversy involving the interpretation and application of the Sherman Anti-trust Act.

(a) Summary of the counts of the declaration relied upon.....15-30

(1) First count 15-18

(2) Second count.....18-19

(3) Third count 19-20

(4) Fourth count.....20

(5) Fifth count.....20

(6) Additional count.....21-30

PAGE

(b) The allegations of the declaration herein raise a substantial question whether the defendant was engaged in inter-state commerce.....32-35

Gibbons v. *Ogden*, 9 Wheat. 1, 189.

Brown v. *Maryland*, 12 Wheat. 419

Passenger Cases, 7 Howard 283.

Pensacola Telegraph Co. v. *Western Union Co.*, 96 U. S. 1.

Wabash Ry. Co. v. *Illinois*, 118 U. S. 557.

International Text Book Co. v. *Pigg*, 217 U. S. 91.

McCall v. *California*, 136 U. S. 104.

Preston v. *Finley*, 72 Fed. 850, 859.

State v. *Bass Publishing Co.*, 104 Me. 288; 71 Atl. 894, 896.

U. S. v. *Associated Bill Posters*, 235 Fed. 540.

City of Pueblo v. *Lukins*, 164 Pac. 1164, 1165 (Colo. 1917).

Circular Advertising Co. v. *American Merc. Co.*, 66 Fla. 96; 63 So. 3.

Marienelli v. *United Booking Offices*, 227 Fed. 165, 168.

(c) The allegations in the declaration herein raise a substantial question whether the defendant in error attempted a monopoly of the branch of interstate commerce in which it was engaged.

Standard Oil Company of New Jersey v. *U. S.*, 221 U. S. 1.

PAGE

U. S. v. *Quaker Oats Co., et al.*, 232 Fed. 499, 500.

Buckeye Powder Co. v. *E. I. Du Pont, De Nemours Powder Co., et al.*, 223 Fed. 881 (Aff'd 248 U. S. 55).

Swift & Co. v. *U. S.*, 196 U. S. 375, 396.

U. S. v. *U. S. Steel Corporation*, 223 Fed. 55, 162.

LIST OF CASES RELIED UPON.

PAGE.

Berkman v. U. S., 250 U. S. 114 11

Boston Store v. American Graphophone Co., 246 U. S. 8 ..... 11, 13

Brown v. Maryland, 12 Wheat. 419 33

Buckeye Powder Company v. E. I. Du Pont De Nemours Powder Co. *et al.*, 223 Fed. 881 (Affirmed 248 U. S. 55) 38

Circul Advertising Co. v. American Merc. Co., 66 Fla. 96; 63 So. 3 (Fla. 1913) 34

City of Pueblo v. Lukins, 164 Pac. 1164, 1165 (Colo. 1917) 34

Gibbons v. Ogden, 9 Wheat. 1 32-33

International Text Book Co. v. Pigg, 217 U. S. 91 33

Louisville & Nashville R. R. Co. v. Rice, 247 U. S. 201, 203 ..... 11, 12

Marienelli v. United Booking Offices, 227 Fed. 165, 168 35

McCall v. California, 136 U. S. 104 ..... 33, 34

Odell v. Farnsworth Co., 250 U. S. 501 ..... 11, 13-14

Passenger Cases, 7 Howard 283 33

Pensacola Telegraph Co. v. Western Union Co., 96 U. S. 1 33

Pratt v. Paris Gas Light & Coke Co., 168 U. S. 255, 259 14

Preston v. Finley, 72 Fed. 850, 859 34

Public Service Co. v. Corboy, 250 U. S. 153 ..... 11, 12

Standard Oil Company of New Jersey v. U. S. 221 U. S. 1 37

State v. Bass Publishing Co., 104 Me. 288; 71 Atl. 894, 896 34

PAGE.

Sutton v. English, 246 U. S. 199..... 11
Swift & Co. v. U. S., 196 U. S. 375, 396..... 39
The Fair v. Kohler Die Co., 228 U. S. 22, 25..... 11
U. S. v. Associated Bill Posters, 235 Fed. 540..... 34
U. S. v. Quaker Oats Co., *et al.*, 232 Fed. 499, 500.... 38
U. S. v. U. S. Steel Corporation, 223 Fed. 55, 162.... 39
Wabash Ry. Co. v. Illinois, 118 U. S. 557..... 33

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1918.

No. 638. (26724)

BLUMENSTOCK BROTHERS ADVERTISING AGENCY,
Plaintiff in Error,

VS.

THE CURTIS PUBLISHING COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief and Argument for Blumenstock Brothers Advertising Agency.

STATEMENT OF THE CASE.

This case comes to the Supreme Court on writ of error to a judgment of the United States District Court for the Northern District of Illinois, Eastern Division. The judgment was entered upon motion of the defendant in error (defendant in the District Court) to dismiss the suit for want of jurisdiction. (Rec., 74.) The District Court found that it had no

jurisdiction over the defendant and no jurisdiction to entertain the action. It was therefore ordered that the service of process be set aside and the cause be dismissed for want of jurisdiction. (Rec., 74.) The motion of the defendant in error and the order of the court sustaining the motion and dismissing the cause for want of jurisdiction were preserved in a bill of exceptions by the plaintiff in error. (Rec., 76, 77.) Thereupon on motion of the plaintiff in error for a certificate by the court that the cause was dismissed for want of jurisdiction the District Court certified to this court

> "pursuant to the statute in such case made and provided the question whether this court had jurisdiction over the said defendant and the said cause. And the court further certifies that the question of jurisdiction involved is whether the transactions set forth in the several counts of the said declaration involve a question of interstate commerce and whether the averments in said several counts in the said declaration contained state a cause of action within the provisions of the Act of Congress approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.'" (Rec., 79, 80.)

Plaintiff in error then prayed out a writ of error on the question of jurisdiction to the Supreme Court under Judicial Code, Section 238. (Rec., 82-84.)

The question before this court is the net question whether the District Court for the Northern District of Illinois had jurisdiction of the cause. This is the single point which can come before this court under Judicial Code, Section 238, which provides for a direct appeal or writ of error to the Supreme Court

> "in any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

The plaintiff in error, Blumenstock Brothers Advertising Agency, the plaintiff below, is a corporation of Missouri. It brought this action at law against the defendant in error, The Curtis Publishing Company, a corporation of Pennsylvania. The first four counts of the declaration were drawn under Section 7 of the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Anti-trust Act or as the Sherman Act. In these four counts the plaintiff in error asks threefold damages against the defendant in error, claiming to have been injured in its business by reason of the unlawful acts of the defendant in error in attempting to create a monopoly in the advertising business described in the declaration, contrary to the provisions of Section 2 of the Act. (Rec., 12-45.)

The declaration also contained a fifth count for damages at common law which the defendant in error caused by an attempt to create a monopoly in the business in question. (Rec., 46-52.)

Subsequently on June 8, 1918, the plaintiff in error by leave of court filed an additional count to the declaration. This count was based upon the claim of an infraction of the Sherman Act and resulting damage to plaintiff in error just as were the first four counts of the original declaration. The additional count differs from the first four counts only in the greater particularity of its statement of the case and

of the circumstances surrounding the carrying on of the business out of which the claim of plaintiff in error arose. (Rec., 59-70.)

Upon the filing of the additional count defendant in error filed a special appearance and motion to dismiss the suit for want of jurisdiction. (Rec., 72.)

A similar motion had been made directed against the original declaration. The second motion extended the first so as to cover the additional count to the declaration. The grounds of dismissal for want of jurisdiction were stated as follows:

> "1. That in each of the counts of plaintiff's original declaration, and in the additional count thereof, it appears that the plaintiff is a citizen and resident of the State of Missouri, and that this defendant is a citizen and resident of the State of Pennsylvania.
>
> 2. That in none of said counts is a cause of action stated by plaintiff within the provisions of the Act of Congress approved July 2, 1890, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies.'"

The learned judge of the District Court, as stated above, sustained this motion of the defendant in error, and found that it had no jurisdiction over the defendant in error and no jurisdiction to entertain the action.

On this writ of error the sole question before the court is whether the District Court had jurisdiction of this case under the Sherman Anti-trust Act.

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court of the United States for the Northern District of Illinois, Eastern Division, erred in entering the order of June 8, 1918, wherein the court set aside the service of process and dismissed the suit for want of jurisdiction over the defendant in error, and in finding that the court had no jurisdiction over the defendant in error and no jurisdiction to entertain the action.

2. The said court erred in said order in that it dismissed said suit for want of jurisdiction of the court over said defendant in error.

3. The said court erred in that it found in and by said order that said court had no jurisdiction over said defendant in error.

4. The said court erred in said order in that it found therein that it had no jurisdiction to entertain the said action.

5. The said court erred in entering the said order in that it therein ordered, adjudged and decreed that the service of process in the above entitled cause be and the same was thereby set aside.

6. The said court erred in the entry of said order in that it thereby ordered, adjudged and decreed that the said cause be and the same was thereby dismissed for want of jurisdiction.

7. The said court erred in that it sustained the motion of the said defendant in error to set aside the service of process in said cause and to dismiss said suit for want of jurisdiction.

8. The said court erred in that it granted the motion of the said defendant in error to set aside the service of process in said cause.

9. The said court erred in that it granted the motion of the said defendant in error to dismiss said suit for want of jurisdiction of the court over the said defendant in error.

10. The said court erred in that it did not overrule the said motion of the defendant in error to set aside service of process in said cause and to dismiss said suit for want of jurisdiction over the said defendant in error.

11. The said court erred in holding in accordance with said motion of the defendant in error that in none of the counts of the plaintiff's original declaration, nor in the additional count thereof, was a cause of action stated by plaintiff in error within the provisions of the Act of Congress approved July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies."

The special appearance and motion to dismiss on behalf of the defendant in er -- will be found on page 72 of the record. The ora. and judgment of the District Court to which the above assignments of error run will be found on page 74 of the record. For assignment of errors see Record, pages 86-88.

ARGUMENT.

THE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN THIS SUIT.

I. The motion of the defendant in error to dismiss the suit for want of jurisdiction was intended to raise a question of the sufficiency of the allegations of the declaration. This does not involve a question of jurisdiction under section 238 of the Judicial Code.

II. The only question upon the motion, the judgment, and the certificate of the court, is the question which must always arise,—whether the allegations of the declaration and the contention that they raise real questions of the interpretation and application of the Sherman Act, are frivolous.

The certificate of the District Court to this court raised no true question of jurisdiction. The court certifies not merely (Rec., 80)

> "that the question of jurisdiction involved is whether the transactions set forth in the several counts of the said declaration involve a question of interstate commerce,"

but also

> "whether the averments in said several counts in said declaration contained state a cause of action within the provisions of the Act of Congress approved July 2, 1890, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies.'"

On its face the decision of the court was on the merits of the case just as if a general demurrer had been filed to the declaration. The question whether the transactions set forth in the several counts of the declaration involve a question of interstate commerce is not a question of jurisdiction unless the question is raised whether the allegations of the declaration in this regard are so frivolous and unsubstantial as not to be worth considering as interstate transactions. The second part of the certificate does not raise a question of jurisdiction at all. It raises a question purely on the merits of the case, namely, "whether the averments in said several counts in the said declaration contained state a cause of action within the provisions of the Act of Congress approved July 2, 1890." If this were a jurisdictional question then the sufficiency of the allegations of every bill in chancery and of every declaration at common law would raise a jurisdictional question under Section 238 of the Judicial Code, which would give the right to a direct appeal or writ of error to this court. Every general demurrer would raise a jurisdictional question under Section 238.

The certificate is based upon the court's order which merely finds "that this court has no jurisdiction over said defendant and no jurisdiction to entertain this action." (Rec., 74.) This order of judgment is in turn based upon the motion of the defendant to dismiss for want of jurisdiction. It is rested upon two grounds. These show that the question before the District Court was not a question of jurisdiction but a question that went to the very merits of the case. The first ground laid was

> "That in each of the counts of plaintiff's original declaration, and in the additional count thereof, it appears that the plaintiff is a citizen and resident of the State of Missouri, and that this defendant is a citizen and resident of the State of Pennsylvania." (Rec., 72.)

The second ground of the motion was

> "That in none of said counts is a cause of action stated by plaintiff within the provisions of the Act of Congress approved July 2, 1890, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies.'" (Rec., 72.)

So far as the first ground is concerned it is plain that if the declaration raises a question under the Sherman Act the plaintiff may sue under Section 7 of that Act

> "* * * in the district in which the defendant resides or is found * * *."

The fact that the plaintiff in error is a citizen and resident of Missouri and that defendant in error is a citizen and resident of Pennsylvania has no more bearing here than has the amount in controversy. The question is merely whether there is a substantial question involved or raised as to the construction and application of the Sherman Act. If the case does not come under the Sherman Act in the sense of raising a substantial question involving the interpretation and application of that Act, the District Court had no jurisdiction. It is unnecessary for the averments to state a good cause of action. It is only necessary that the averments raise a question to be determined one way or the other under the Act.

The second ground shows clearly that the merits

of the case are the only real object of attack of the motion. The ground of the motion "that in none of said counts is a cause of action stated" under the Sherman Act raises on its face the merits of the plaintiff in error's action. As the ground is stated in the motion it does not state a jurisdictional question at all. The question raised by the motion of defendant in error was a question going to the merits of the case. It did not involve any jurisdictional question which should give rise under Section 238 of the Judicial Code to a direct appeal or writ of error from the District Court to the Supreme Court. On a motion designed to raise a jurisdictional question the allegations of the declaration should have been brought before the court below *only* for the purpose of ascertaining whether it presented a question under the Sherman Act of substantial character and not merely frivolous. The fact that such a substantial question under the Sherman Act might be decided one way or the other upon the allegations of the declaration would not raise any jurisdictional question.

Coming to this court on writ of error to the judgment of the District Court and on its certificate, only the jurisdictional question may be considered. This court will, as we understand the authorities, examine the declaration only to satisfy itself that a question is raised under the Act of July 2, 1890. It will therefore be necessary after discussing briefly the jurisdictional point to bring to the attention of the court the character of the allegations of the declaration which we claim to involve a question of the construction or application of the Sherman Act, ultimately to be heard and determined by the District Court.

The following cases cover the question of jurisdiction:

Louisville & Nashville R. R. Co. v. *Rice*, 247 U. S. 201, 203.
Boston Store v. *American Graphophone Co.*, 246 U. S. 8.
Sutton v. *English*, 246 U. S. 199.
Public Service Co. v. *Corboy*, 250 U. S. 153.
Odell v. *Farnsworth Co.*, 250 U. S. 501.
Berkman v. *United States*, 250 U. S. 114.

In *Louisville & Nashville R. R. Co.* v. *Rice, supra*, the District Court decided that it had no jurisdiction. The suit was brought to recover $145 claimed to be due under tariffs approved and published as required by the Interstate Commerce Act. The court held that inasmuch as the result of the action necessarily depended upon the construction and effect of the Interstate Commerce Act, it was a cause of which the District Court had jurisdiction under Section 24 of the Judicial Code which provides that regardless of the amount involved District Courts should have original jurisdiction "of all suits and proceedings arising under any law regulating commerce." The court quotes with approval the language in

The Fair v. *Kohler Die Co.*, 228 U. S. 22, 25,

as follows:

> "If the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad."

This is another way of saying that the court has jurisdiction without regard to the ultimate merits of

the plaintiff's declaration. In the present case, whether the plaintiff's declaration makes out a good case or not, so long as it sets forth a substantial question requiring the interpretation and application of the Sherman Act, under a motion to dismiss for want of jurisdiction the District Court could only examine the declaration to satisfy an inquiry whether the declaration set up such a question. This point is brought out clearly in

Public Service Co. v. *Corboy, supra.*

In this case the District Court for the District of Indiana dismissed the bill. The question of jurisdiction depended upon whether the court had a right to issue an injunction under Section 265 of the Judicial Code forbidding the grant of a writ of injunction by any court of the United States to stay proceedings in any state court except in connection with bankruptcy proceedings. The Supreme Court held that the District Court had jurisdiction. The court said:

> "The arguments at bar pressed upon our attention considerations based upon the assumed application of general principles of comity, but, as on this direct appeal, we have power alone to consider questions of the jurisdiction of the court below as a federal court, they are not open to our consideration. *Louisville Trust Co.* v. *Knott,* 191 U. S. 225. This, moreover, puts out of view the argument advanced concerning the adequacy of the averments of the bill to justify relief, since that subject necessarily, for the reasons stated, must be left to the consideration of the court below when it exercises jurisdiction of the cause."

The court, as in *Louisville & Nashville R. R. Co.* v. *Rice, supra,* reversed the decree and remanded the

case for further proceedings in accordance with the opinion.

It will have been seen that the motion of the defendant in error did not raise a true question of jurisdiction. The court below in deciding the motion fell into the same mistake. Both the court and the defendant in error looked to the sufficiency of the allegations of the declaration on their merits. The true rule is shown in

Boston Store v. *American Graphophone Co.*, *supra.*

The court said on page 26:

> "The first question is, 'Does jurisdiction attach under the patent laws of the United States?' As we assume under the admissions of counsel that the bill asserted the existence of rights under the patent law, and as at the time it was filed the want of merit in such assertion had not been so conclusively settled as to cause it to be frivolous, we are of opinion that the court had jurisdiction to pass upon the case as made by the bill, that is, to determine whether or not the suit arose under the patent law and hence as thus understood the question should be answered, yes."

In

Odell v. *Farnsworth Co., supra,*

a suit was brought by Odell against the Farnsworth Company for an accounting for royalties, claimed to be due from the defendant to the plaintiff upon a contract by which the defendant, the assignee of a patent of the plaintiff, agreed to pay plaintiff, in addition to the sum paid for the assignment, a royalty upon each apparatus sold until there should be received the sum of $1,800 on account of such roy-

alties. The court held that if the bill only prayed for a discovery of the number of apparatus sold by the defendant and for an accounting, no question involving the construction of the patent laws arose so as to give the District Court jurisdiction under Judicial Code, Section 24, par. 7, the court said:

> "To constitute a suit under the patent laws the 'plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of these laws.'"

Quoting above from

> *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 259.

The statement quoted from *Pratt* v. *Paris Gas Light & Coke Co.* is immediately in point here as illustrating the question now before this court. If the plaintiff in error here makes it appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of the Sherman Act, then the court below had jurisdiction wholly irrespective of the question whether the declaration stated a good cause of action.

III. The first four counts and the additional count of the declaration present a substantial controversy involving the interpretation and application of the Sherman Anti-trust Act.

As before stated there is no question here of the merits of the plaintiff in error's declaration. It is necessary, however, to consider the allegations of

the declaration, but only for the purpose of showing that a question is raised under the Sherman Anti-trust Act. The District Court would not have had jurisdiction if the allegations of the declaration were, with reference to the Sherman Act, merely frivolous. There must be a substantial question of the interpretation and application of the Sherman Act raised.

We bring to the court's attention the following summary of the first four original counts and of the additional count filed June 8, 1918, by leave of court.

First Count. (Rec., 12-20.) January 1, 1914, the plaintiff (plaintiff in error here), a Missouri corporation, was doing business in Chicago in the conduct of an advertising agency representing customers who placed their advertisements in publications such as those owned by the defendant (defendant in error here). The defendant, Curtis Publishing Company, published and distributed magazines or periodicals among which was "The Saturday Evening Post." The circulation throughout the United States of "The Saturday Evening Post" at this time was between one and one-half million and two million copies a week. It published articles of a literary kind and these were distributed throughout the United States and the several states thereof. Thus "The Saturday Evening Post" reached and was read by an important part of the general community throughout the United States and the several states thereof. The defendant held itself out at all times as ready to receive, publish and distribute in its publications, advertisements of articles offered

by advertisers for sale, or manufactured by them. In its business the defendant dealt directly with the plaintiff and with many other similar advertising agencies and took and received from such agencies advertisements controlled by them. The facilities for advertising so afforded by the defendant through its publications were especially valuable to the persons whom the plaintiff represented, in that these publications of the defendant came to the attention of the persons interested in the advertisements who were residents of the larger cities of the United States; and the business thus done with the plaintiff was a business constituting interstate commerce.

The commerce of the United States and among the several states is greatly dependent upon the advertising facilities offered by periodicals published, sold and distributed throughout the United States and the several states thereof. Such periodicals constitute the chief method of presenting to the public of the several states the goods held out for sale by such persons as the customers of the plaintiff. Such advertising facilities are necessary in order to bring goods of merchants and manufacturers to the attention of the public. "The Saturday Evening Post" has an important position among such publications. The commercial and manufacturing business of the United States as it exists and is conducted at the present time is especially dependent upon the opportunities and facilities for advertising in such publications as those of the defendant. The defendant's publications together with some others have to a great extent the exclusive control of a certain limited field of advertising. All

the advertising business in this field is controlled and done by not more than 20 publications which are owned, managed and published by not more than 15 persons, firms and corporations. There are no other adequate opportunities for advertising such goods as those of the persons whom the plaintiff represented than the publications of this group. The defendant has control of a large portion of the advertising business offered to such periodicals and publications.

The rates for advertising received by the defendant are much higher than the rates asked by owners of the other periodicals in the same restricted field of advertising.

The defendant desired to gain for itself and its publications a monopoly of the said restricted lines of advertising, in violation of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraint and monopolies." The defendant with the intent of injuring the property and business of the plaintiff by unlawful means, contrary to said Act of Congress, refused and continued to refuse without reasonable cause to accept proper and ordinary advertising matter offered in the reasonable and usual way to the defendant by the plaintiff for printing in its publications, particularly in the said "The Saturday Evening Post." Plaintiff tendered such advertising matter to defendant and offered to pay defendant the usual and regular sums asked by defendant for publication of advertising matter, but the defendant refused and has continued to refuse to accept or publish such advertisements unless the plain-

tiff agreed to permit the defendant to control and limit, at the arbitrary will of the defendant, the amount of advertising given by the plaintiff to the owners or publishers of the other magazines, journals, periodicals and other publications aforesaid, competing with the defendant in the field of advertising above mentioned and described. The plaintiff by means of such illegal acts done by the defendant in pursuance of its object and scheme to create a monopoly for itself in the said advertising business lost the business of its (the plaintiff's) customers, whom it represented in placing advertisements in the publications of the defendant. The plaintiff was thereby prevented from making further contracts in said lines of advertising for placing advertising matter of its customers in the publications of the defendant, and in consequence thereof, in any other publications of like or similar character. The business of the plaintiff was thereby greatly diminished and the plaintiff was injured in its business and property by the defendant through its wrongful acts in pursuance of its attempt to monopolize said advertising business. The plaintiff suffered loss in the sum of $25,000, to recover three-fold of such damages, this suit is brought under the Sheramn Act.

Second Count. (Rec., 20-27.) The second count contains the same matter as the first count except in the allegations as to the wrongful acts. It is alleged that the defendant (defendant in error here) refused to receive advertising matter for publication from the plaintiff (plaintiff in error here) even after the plaintiff tendered such advertising matter

with the price asked by the defendant for publication and distribution, unless the plaintiff would agree to give the defendant a preponderating amount of advertising business and a greater amount than it gave or might give to other persons, firms and corporations publishing magazines, periodicals and publications, which were competitors of the defendant and of the publications of the defendant, in regard to the publication of such advertisements; and unless the plaintiff should take away from the said publishers and owners of other similar competing publications a large amount of the advertisements which had been given by the plaintiff to such other publications not owned and published by the defendant; and that such refusal was for the purpose of controlling and reducing the amount of advertising given by the plaintiff to the other publications owned and controlled by persons other than the defendant who were and are competitors of the defendant, in order that the defendant might create a monopoly in the said advertising business contrary to and in violation of the Sherman Act.

THIRD COUNT. (Rec., 28-36.) In the third count there is alleged a like refusal by the defendant (defendant in error here) to receive and publish advertising matter offered by the plaintiff (plaintiff in error here), *and offered by other agencies* in behalf of their respective customers unless the plaintiff *and such other agencies* should agree to permit the defendant to control and limit at the arbitrary will of the defendant the amount of advertising given by said agencies to the owners and publishers of the other magazines and publications aforesaid, which

were competing with the defendant for and in the field of advertising mentioned.

FOURTH COUNT. (Rec., 36-45.) In the fourth count the wrongful acts are thus stated: For the purpose of obtaining a monopoly of a restricted field of advertising described, contrary to the Sherman Act, the defendant refused to accept or publish advertisements offered it by the plaintiff on behalf of its customers *and by the other agencies* on behalf of their respective customers "unless the plaintiff and *the other said agencies* respectively agreed to give to the defendant a preponderating amount of advertising business and a greater amount than they respectively gave or might give to the other persons, firms and corporations, publishing magazines, periodicals and publications which were then and there competitors of the defendant and of the publications of the defendant in regard to the publication of such advertisements; and the defendant demanded of the plaintiff that it take away from the said publishers and owners of the other similar publications as aforesaid, a large amount of the advertisement which had been given by the plaintiff to such other publications not owned and published by the defendant.

FIFTH COUNT. (Rec., 46-52.) The fifth count alleges the wrongful acts not as giving rights to the remedy afforded by Section 7 of the Sherman Act, but as wrongful acts at common law. The plaintiff does not press its action on this count. It is admitted that the District Court did not have jurisdiction over the person of the defendant so far as concerns the fifth count of the declaration.

ADDITIONAL COUNT. (Rec., 59-70.) The plaintiff (plaintiff in error here), a Missouri corporation was engaged in business as an advertising agency at Chicago, Illinois, January 1, 1914. The nature of the plaintiff's business was that when its customers were desirous of placing advertisements in periodicals and having these advertisements distributed in the periodicals the plaintiff would act for and represent such customers in negotiating contracts with the defendant and other publishers and distributors of periodicals for the publication and distribution of advertising matter throughout the United States and the several states thereof. The plaintiff had many of such customers for whom it placed advertisements in the periodicals published and distributed by the defendant and in other periodicals, all of which were distributed throughout the United States and the several states thereof. This business of the plaintiff in placing with the publications of the defendant and other periodicals such advertising matter was a prosperous business.

The defendant (defendant in error here), a Pennsylvania corporation was the owner, publisher, seller and distributor of certain periodicals including "The Saturday Evening Post," which periodicals it sold and distributed throughout the United States and the several states thereof. This business, in which the defendant was engaged, namely—of publishing, selling and distributing such publications throughout the United States and the several states thereof, constituted commerce among the states or interstate commerce.

"The Saturday Evening Post" was and is a weekly illustrated publication, circulated and distributed throughout the United States and the several states thereof in vast quantities. The circulation of that periodical aggregated on January 1, 1914, between one and one-half million and two million copies for each week's issue. "The Saturday Evening Post" contained in each weekly issue articles, essays, stories, serial novels, comments on items of literature, commerce and general interest and especially a very large amount of advertising matter of interest to its readers, purchasers and subscribers throughout the United States and the several states thereof. The advertising matter contained in "The Saturday Evening Post" constituted a large part of all of the matter therein contained.

The defendant publishes and distributes other publications, including "The Ladies' Home Journal" and "The Country Gentleman," the former being a monthly publication and the latter a weekly publication, both of which have a large circulation throughout the United States and the several states thereof.

In the conduct and management of its business in publishing and distributing the above periodicals throughout the United States and the several states thereof the defendant held itself out at all times, and particularly on January 1, 1914, as ready, willing and desirous to receive, publish, and distribute throughout the United States and the several states thereof, in its publications or periodicals mentioned above, advertisements from any and all persons,

firms and corporations, concerning their business and occupations.

The defendant did in fact take and receive for publication and distribution throughout the United States and the several states thereof, in its periodicals mentioned above, such advertisements, and in the course of this business dealt with the plaintiff and with many other advertising agencies operating along the lines that the plaintiff operated; and the defendant entered into contracts with these agencies for such publication and distribution throughout the United States and the several states thereof. The defendant recognized the advertising agencies, such as the plaintiff, as representatives and agents of persons, firms and corporations, who sought to have their business or goods advertised through the publication and distribution, throughout the United States and the several states thereof, of such advertising matter in the aforementioned publications of the defendant. In the regular course of its business in so publishing and distributing its aforementioned publications throughout the United States and the several states thereof, the defendant and other publishers dealt directly not only with the advertisers themselves but also with the advertising agencies such as that of the plaintiff. The dealings and transactions between the defendant and these advertising agencies are transactions of interstate commerce and constitute commerce among the several states.

The advertising facilities afforded by the defendant through the publication and distribution of "The Saturday Evening Post" and the other periodicals which it published and distributed throughout the

United States and the several states thereof were especially valuable and necessary to the plaintiff's customers, the persons for whom the plaintiff acted, and whom the plaintiff represented in placing advertising matter as set out above. The publications of the defendant, containing the advertisements before mentioned, were distributed by the defendant throughout the United States and the several states and reached and came to the attention of the readers and subscribers interested in the advertisements, and particularly of persons resident in the larger cities of the United States. This business of the defendant in which it contracted with the plaintiff and other advertising agencies and advertisers to publish and distribute throughout the United States and the several states thereof, advertisements in "The Saturday Evening Post" and other publications of the defendant constituted interstate commerce as did the transactions involved in carrying out such contracts.

Commerce in the United States, including interstate commerce, especially that involving transactions between merchants and manufacturers, and between merchants, manufacturers and the general public, is dependent, in its growth and development, particularly in the case of certain modes of sale and distribution of goods and manufactured wares, upon the advertising facilities offered by newspapers, journals and other periodicals, such as those of the defendant, which are published, sold and distributed throughout the United States and the several states thereof. These publications constitute the chief method of presenting to the purchasing public of

the United States and the several states thereof goods and merchandise held out for sale by such advertisers, as were the customers of the plaintiff, who have been mentioned above. The advertising facilities offered by these periodicals, including the periodicals of the defendant, were necessary to these advertisers such as those who were the customers of the plaintiff in order that they might bring their products to the notice and attention of prospective purchasers throughout the United States and the several states thereof. The periodicals which have been mentioned as being owned, controlled, edited, published and distributed throughout the United States and the several states thereof by the defendant, and particularly that one known as "The Saturday Evening Post", had an important position or rank among a certain number of advertising mediums which are intended to reach and do reach a constantly increasing portion of the purchasing public throughout the United States and the several states thereof.

The publication of the defendant, known as "The Saturday Evening Post", holds in the field of the periodicals of its type a predominant and preponderant position, and for that reason it is the most necessary of any such advertising mediums to advertisers such as those who constitute the customers of the plaintiff. There has grown up and was in existence on January 1, 1914, a large body of persons throughout the United States to whom such periodicals, including especially "The Saturday Evening Post", came. These periodicals, especially "The Saturday Evening Post," were read by these per-

sons throughout the United States and their purchases of goods, wares and merchandise of advertisers, such as those who were the customers of the plaintiff, are and were to a great and important extent directed and influenced by the advertisements contained in such periodicals, especially those contained in the defendant's publication known as "The Saturday Evening Post." At the time in question the defendant's publication known as "The Saturday Evening Post," held a predominant position in the field of advertising which is herein described, and it carried a preponderating amount of advertising matter, including the classes of goods of the advertisers, who were customers of the plaintiff and of the advertising agencies mentioned above. The commerce of the United States as developed throughout the United States and the several states thereof and as it existed and was conducted on January 1, 1914, was essentially dependent upon opportunities and facilities for advertising in the various periodicals mentioned and was especially dependent upon the opportunities and facilities for advertising in the publication of the defendant, known as "The Saturday Evening Post," because that publication held a controlling and dominating position among the advertising mediums of its own class and stood out as an essential medium of interstate advertising on which the dealers and manufacturers of certain lines of goods including some of the customers of the plaintiff who have been mentioned were necessarily dependent.

The periodicals owned and published by the defendant together with certain other periodicals owned and published, by other persons than the defend-

ant, had to a great extent the exclusive control of a certain field of advertising, including a more or less limited number of advertisers of certain classes of goods. This limited field of advertising was of great pecuniary value to the owners of the publications which carried such advertising and was of great pecuniary value to advertising agencies, such as the plaintiff. The periodicals which control and do all the advertising business of the field of advertising in question are few in number and are owned and published by a small group of firms and corporations.

There were at the time in question no adequate opportunities or facilities for advertising such businesses and goods as those covered by this limited field which included the customers of the plaintiff and of the other advertising agencies in question, excepting those offered through the publications of the defendant and the other publishers whose periodicals have been referred to. In this regard the publication of the defendant known as "The Saturday Evening Post," because it held and was recognized as holding a unique position as a medium of advertising on account of its predominant position in the field of publications to which it belonged due to its wide circulation and distribution throughout the United States and the several states, is particularly prominent.

The defendant at the time in question had control of a large proportion of the advertising business offered to such periodicals for the purpose of being published and distributed throughout the United States and the several states thereof. On account of

its preponderant position the rates for advertising which it asked and received, particularly in the one known as "The Saturday Evening Post," were at the time in question much higher than the rates for advertising asked by the owners of other periodicals of the same class covering the same restricted field of advertising and distributed over practically the same geographical area.

The defendant was desirous of using its preponderant position in this special field of advertising as a means of acquiring and gaining for its periodicals, especially for its publication known as "The Saturday Evening Post," a monopoly in the publication and distribution of advertising matter in this restricted field of advertising throughout the United States and the several states thereof, contrary to and in violation of the provisions of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," with intent to injure the property and business of the plaintiff by means declared to be unlawful by said act of Congress. The defendant at the time in question refused and continues to refuse, without any reasonable cause for such refusal, to accept proper and ordinary advertising matter offered in the reasonable and usual way to the defendant by the plaintiff and by other advertising agencies for the purpose of having it printed, published and distributed throughout the United States and the several states thereof by the defendant in its periodicals particularly in that one known as "The Saturday Evening Post," which as the defendant knew was a periodical standing in a preponderant position in the field

of advertising described and was a publication absolutely necessary as an advertising medium to the customers of the plaintiff; and which publication the defendant knew was, therefore, absolutely necessary to the prosperity and in fact to the continuance of the plaintiff's business as an advertising agency.

The plaintiff and the other advertising agencies referred to tendered advertising matter to the defendant in the usual and ordinary way and offered to pay to the defendant the usual and regular sum or sums of money asked by the defendant for the publication and distribution of such advertising matter in its publications. The defendant refused to accept or publish such advertisements offered to it by the plaintiff and the other agencies referred to and has continued to refuse to accept such advertising unless the plaintiff and the other advertising agencies referred to agreed to allow the defendant to increase its preponderance in said field of advertising and to increase its control of that field of advertising by allowing the defendant to control, limit and reduce at its arbitrary will the amount of advertising which the plaintiff, and the other advertising agencies mentioned, should give to the owners or publishers of other periodicals which were attempting to compete with the defendant in the field of advertising in which the defendant was engaged.

By means of such illegal and wrongful acts the defendant pursuant to its object and attempt to create a monopoly for its own benefit in the advertising business hereinbefore described, caused the plaintiff to lose the business of its customers for whom it had been and was at the time in question acting as repre-

sentative in the placing of advertisements with the periodicals of the defendant and with other publications. The plaintiff was thereby prevented from making further contracts with its customers for the placing of their advertising matter in the periodicals published by the defendant and in consequence thereof was prevented from making further contracts with its customers for the placing of their advertisements in other publications. The business of the plaintiff was on this account greatly restrained and diminished so that the plaintiff was injured in its business and property, on account of these wrongful and illegal acts of the defendant in its attempt to create a monopoly contrary to the Sherman Act, to the extent of $25,000. This suit is brought to recover three-fold damages under Section 7 of the Sherman Act on account of such injury and damage to the plaintiff's business and property.

The sole question before this court on this writ of error is whether the District Court of the United States had jurisdiction to entertain the suit brought on the declaration, the essential parts of which have been set out above. The plaintiff in error contends that the District Court had jurisdiction under Section 7 of the Sherman Anti-trust Act. In order that the District Court may have jurisdiction under this section, it is necessary that the declaration show a substantial as distinguished from a frivolous claim, and that it show a claim, the merits of which involve to a substantial extent rather than in a frivolous or collateral manner, the construction and application of the Sherman Act.

The four original counts of the declaration and

the additional count filed in this case are based solely on the contention that the defendant, a corporation engaged in interstate commerce, desired and attempted to monopolize the branch of interstate commerce in which it was engaged and that by certain acts and practices in pursuance of its attempt to monopolize this branch of interstate commerce, it injured the business and property of the plaintiff to the extent of $25,000. The contention of the plaintiff in error is that the defendant in error in the acts and practices set out in the declaration and in the additional count was attempting to create a monopoly in its line of business in violation of Section 2 of the Sherman Act, and that in doing these acts and in carrying on these practices, the defendant in error injured the plaintiff in error in its business and property to the extent of $25,000, thus giving a right of action to the plaintiff in error under Section 7 of the Sherman Act.

To show a violation of Section 2 of the Sherman Act, it is necessary to show:

That the defendant was engaged in interstate commerce.

That the defendant attempted to monopolize the branch of interstate commerce in which it was engaged.

1. The allegations of the declaration herein raise a substantial question whether defendant was engaged in interstate commerce.

It is contended by the plaintiff in error that the declaration and additional count in this case show that the business in which the defendant is alleged to have attempted to create a monopoly was interstate commerce. They allege that the defendant in error was engaged in the business of publishing and distributing advertisements in its periodicals, particularly in "The Saturday Evening Post," throughout the United States and the several states thereof and that the defendant in error was engaged in securing contracts with advertisers and advertising agencies, including the plaintiff in error, under which it agreed to publish and distribute throughout the United States and the several states, the advertisements which the advertisers and advertising agencies desired to have distributed.

The business of publishing and distributing advertising matter, where such advertising matter is distributed throughout the several states of the United States, is interstate commerce.

Chief Justice Marshall defined "commerce" as follows in:

Gibbons v. *Ogden*, 9 Wheat. 1, 189,

> "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

This definition has been repeatedly approved by this court. See

Brown v. *Maryland*, 12 Wheat. 419.
Passenger Cases, 7 Howard 283.
Pensacola Telegraph Co. v. *Western Union Co.*, 96 U. S. 1.
Wabash Ry. Co. v. *Illinois*, 118 U. S. 557.

This court has held that a business which involved sending across state lines instruction papers, text books, and illustrative apparatus for courses of study to be pursued by means of correspondence is interstate commerce.

International Text Book Co. v. *Pigg*, 217 U. S. 91.

This court has held that the business of soliciting and inducing passengers in San Francisco to patronize a certain railway line running between Chicago and New York constituted interstate commerce.

McCall v. *California*, 136 U. S. 104.

The business of the defendant in error here which, involving, as one of its elements, the shipment of large numbers of it periodicals containing the advertisements of advertisers which the defendant in error had contracted with the advertisers and advertising agencies to publish and distribute across state lines, is in that feature, analogous to the shipments of the International Text Book Company held in *International Text Book Company* v. *Pigg, supra*, to be the element of that company's business which constituted such business interstate commerce.

The element of the defendant in error's business which involves holding itself out as willing to enter

into, and which involved entering into, contracts under which it agreed to publish and distribute advertisements across state lines, renders its business interstate commerce to the same extent that the business of McCall in *McCall* v. *California, supra*, was interstate business.

The Federal courts and the higher courts of the several states of the United States have held that business of the nature of that in which the defendant in error is alleged to have been engaged in the declaration in this case, is interstate commerce.

A business involving as one of its elements, the sending of newspapers from one state to another, is interstate commerce.

Preston v. *Finley*, 72 Fed. 850, 859.

State v. *Bass Publishing Co.*, 104 Me. 288; 71 Atl. 894, 896.

The business of bill posters extending over the several states is interstate commerce.

U. S. v. *Associated Bill Posters*, 235 Fed. 540.

The distribution in a city of advertising handbills for the purpose of stimulating a business involving the shipment of goods across state lines has been held to be interstate commerce.

City of Pueblo v. *Lukins*, 164 Pac. 1164, 1165 (Colo. 1917).

A business involving the shipment of circular advertising matter from one state to another is interstate commerce.

Circular Advertising Co. v. *American Merc. Co.*, 66 Fla. 96; 63 So. 3 (Fla. 1913).

Another case in which a business involving the shipment of advertising matter and information across state lines has been held to constitute interstate commerce is

Marienelli v. *United Booking Offices*, 227 Fed. 165, 168.

In setting out the business of the defendant in error, in which it was engaged with the plaintiff in error, and with other advertising agencies, and in the conduct of which it is alleged to have injured the plaintiff's business and property, the plaintiff in error has made allegations which comply with the requirement of Section 2 of the Sherman Act in so far as the element of interstate commerce is involved.

2. The allegations in the declaration herein raise a substantial question whether the defendant in error attempted a monopoly of the branch of interstate commerce in which it was engaged.

The further element which it is necessary that the first four counts and the additional count filed by the plaintiff in error must show, lies in the allegations which raise in a substantial manner the question whether or not the defendant in error attempted to create a monopoly in the business which the allegations show it to have been egaged in.

The counts upon which the plaintiff in error relies do not allege a conspiracy, or a combination under Section 1 of the Sherman Act, but do allege that the acts and course of conduct set out when taken to-

gether with the preponderant position of the defendant in error in its field of enterprise show an intent and an attempt to monopolize the branch of interstate commerce in which it is alleged the defendant in error was engaged. Section 2 of the Sherman Act is violated when any person attempts to monopolize any part of the trade or commerce among the several states. The allegations of the several counts relied upon set out that the defendant in error was the dominating and to a large extent the controlling factor in the branch of interstate commerce in which it was engaged. There are numerous allegations as to the relative size, power and influence of the defendant in error all of which indicate that the defendant in error was peculiarly situated for the accomplishment of any purpose, which it might have, to monopolize the business of publishing and distributing advertisements in weekly publications of national distribution; in other words, of monopolizing the weekly national advertising business.

The allegations and the counts under consideration set out acts and continuing practices of oppression and unfair trading, which when taken into consideration with the position held by the defendant in error, clearly indicate a desire and intent and practices pursuant thereto, which raise a substantial question whether or not the defendant in error was attempting to monopolize the business in which it was engaged. Such allegations, when taken with the allegations that the business in which the defendant in error was engaged was a business constituting interstate commerce, raise a substantial question of construction and effect of Section 2 of the Sherman Act.

The opinion of the Chief Justice of this court in the case of

Standard Oil Company of New Jersey v *U. S.*, 221 U. S. 1,

interprets the meaning of Section 2 of the Sherman Act, in the following language at page 40:

> "And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. * * * By reference to the terms of § 8, it is certain that the word person clearly implies a corporation as well as an individual.
>
> The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.
>
> Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end

> prohibited by the first section, that is restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section."

A question of the construction and effect of the second section of the Sherman Act is raised by allegations of a substantial nature that a single corporation of preponderant position, by acts not necessarily included within the general enumeration of the first section, displays an intent and an attempt pursuant thereto to create a monopoly. It is not necessary in order to raise a question of the construction and effect of Section 2 that a contract, combination or conspiracy be alleged. Section 2 is directed at any person or any corporation which attempts to monopolize by its individual efforts as well as any person or any corporation which combines or conspires with others to monopolize. See

> *U. S.* v. *Quaker Oats Co. et al.*, 232 Fed. 499, 500.
>
> *Buckeye Powder Co.* v. *E. I. Du Pont De Nemours Powder Co. et al.*, 223 Fed. 881 (aff'd. 248 U. S. 55).

In *U. S.* v. *Quaker Oats Co. et al.*, Circuit Judge Baker said in his opinion, at page 500:

> "One man or one institution, however, may be guilty of creating a monopoly, or attempting to create a monopoly, and so, legally, the existence of any case here would be dependent upon a violation of Section 2."

The allegations in the counts involved in this case describe the relative size and position of the defend-

ant in error in its field of interstate commerce. These allegations are an element in determining the substantial nature of the claim of an attempt to monopolize. See

Swift & Co. v. *U. S.*, 196 U. S. 375, 396.
U. S. v. *U. S. Steel Corporation*, 223 Fed. 55, 162.

The allegations regarding the preponderant position of the defendant in error in its field of interstate commerce raise a substantial question under Section 2 of the Sherman Act, when taken together with the acts and practices alleged, as to whether or not there was an attempt to create a monopoly. There are set out in the counts under consideration the extent of control secured by the defendant in error over the branch of interstate commerce in which it was engaged. These allegations raise a question of intent to be inferred from such control when considered in connection with the oppressive practices alleged to have been indulged in by the defendant in error. These allegations bring out a prejudice to the public interests by the undue restriction of competition and the undue obstruction of the course of interstate trade in which the defendant in error was engaged. These are the type of allegations which raise a substantial question of the interpretation, the effect and the application of the Sherman Act. They are the elements which the Federal Court in the

United States v. *U. S. Steel Corp., Supra,*

referred to on page 162, where the court says:

> "Whether the Steel Corporation is a combination in restraint of trade, or has monopolized, or has attempted to monopolize, commerce

among the states in violation of the Anti-Trust Law, depends upon the inherent nature or effect of the combination, the evident purpose of its acts, or the intent to be inferred from the extent of the control secured over the industry, the method by which such control has been brought about, and the manner in which it has been exerted, resulting in prejudice to the public interest by unduly restricting competition or unduly obstructing the course of trade."

The interstate character of the transactions is clear. It is equally clear that a question is raised of the application of the Sherman Act to the practices complained of. The wrongful acts alleged are on their face directed against the business of the competitors of the defendant in error. On their face these acts seek to affect competition. Their only object can be to control persons like the plaintiff in error, who are the customers in the advertising market. This attempted control is manifestly oppressive. It is oppressive in that it coerces the plaintiff in error and other advertisers to the will of the defendant in error. As alleged the mode of dealing of the defendant in error which gives rights to this suit are such as plainly come within the scope of the phrase "unfair trading." This being so, no element is lacking to raise a question of the infraction of the Sherman Act. Indeed the defendant in error's course of dealing is not merely unfair trading but on its face is directed at a monopoly. There could be no other purpose.

The allegations as to the damages suffered by plaintiff in error raise a substantial question under Section 7 of the Sherman Act. A cause of action is given by this section to any person injured in his

business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the Act. The manner in which the plaintiff in error was injured in this case is set out in the allegations of the declaration. The connection between the illegal acts of the defendant in error and the injury to the business of the plaintiff in error are clearly set forth.

Respectfully submitted,

COLIN C. H. FYFFE,
PAUL N. DALE,
DAVID R. CLARKE,
Attorneys for Plaintiff in Error.

FILED
JAN 12 1920
JAMES D. MAHER,
CLERK

197

No. 638 (26724).

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY,
Plaintiff in Error,

vs.

THE CURTIS PUBLISHING COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR THE CURTIS PUBLISHING COMPANY, DEFENDANT IN ERROR.

AMOS C. MILLER,
SIDNEY S. GORHAM,
HENRY W. WALES,
GILBERT NOXON,
Attorneys for Defendant in Error.

DUNLOP-HARPER PRINTING COMPANY, CHICAGO.

I.

INDEX.

PAGE

ARGUMENT.

I. The District Court had no jurisdiction to entertain this suit unless the declaration of plaintiff in error states a cause of action under the provisions of an Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies" (Sherman Act) 1-6

Dueber Watch-Case Manuf'g. Co. v. *E. Howard Watch & Clock Co. et al.*, 66 Fed., 637, p. 641.

State of Tennessee v. *Union & Planters Bank*, 152 U. S., 454.

Metcalf v. *Watertown*, 128 U. S., 586.

Newburyport Water Co. v. *City of Newburyport*, 193 U. S., 562, p. 576.

Defiance Water Co. v. *Defiance*, 191 U. S., 184, p. 191.

Underground Railroad of the City of New York v. *City of New York*, 193 U. S., 417.

Arbuckle v. *Blackburn*, 191 U. S., 406.

Norton v. *Whiteside*, 239 U. S., 144.

Delaware, Lackawanna & Western R. R. Co. v. *Yurkonis*, 238 U. S., 439.

Simons v. *Steamship Jefferson*, 215 U. S., 130.

Lehigh Railroad Co. v. *Cornell Steamboat Co.*, 218 U. S., 269.

Fred L. Grant Shoe Co. v. *W. M. Laird Co.*, 212 U. S., 445.

PAGE

Healy v. *Seagull Specialty Co.*, 237 U. S., 479.

Briggs v. *United Shoe Machinery Company*, 239 U. S., 49.

Globe Newspaper Co. v. *Walker*, 210 U. S., 356.

II. In no count of plaintiff's declaration is a cause of action stated within the provisions of the Act of Congress approved July 21, 1890, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies" 6-22

(A) The transactions complained of in the declaration do not constitute interstate commerce. 9-15

Hooper v. *State of California*, 155 U. S., 648.

Paul v. *Virginia*, 8 Wallace, 168.

Williams v. *Fears*, 179 U. S., 270.

United States Fidelity & Guaranty Co. of Baltimore, Md., v. *Commonwealth of Kentucky*, 231 U. S., 394.

Hopkins v. *United States*, 171 U. S., 579.

Ficklen v. *The Taxing District of Shelby County*, 145 U. S., 1.

United States v. *E. C. Knight Company*, 156 U. S., 1.

State v. *Morgan*, 2 S. D., 32.

(B) Apart from the question of interstate commerce, no cause of action under the Sherman Act is stated in the declaration 15-22

(a) Insufficiency of declaration tested by rules of pleading 16-19

Rice v. *Standard Oil Company*, 134 Fed., 464.

PAGE

Cilly v. *United Shoe Company*, 152 Fed., 726.
Buckeye Powder Company v. *Du Pont Powder Company*, 196 Fed., 514.
Otis Elevator Company v. *Geiger*, 107 Fed., 131.
McLatchy v. *King*, 250 Fed., 920.
Corey v. *Boston Ice Co.*, 207 Fed., 465.

(b) Substantive insufficiency of declaration...19-22
Nash v. *United States*, 229 U. S., 373.
Anderson v. *United States*, 171 U. S., 604.
Union Pacific Coal Company v. *U. S.*, 173 Fed., 737.
Patterson v. *U. S.*, 222 Fed., 599.
U. S. v. *Whiting*, 212 Fed., 466.
Trans-Missouri Case, 166 U. S., 320.
Northern Securities Co. v. *U. S.*, 193 U. S., 361.
Eastern States Retail Lumber Dealers Assn. v. *U. S.*, 234 U. S., 614.
U. S. v. *Colgate & Company*, U. S. Adv. Ops. (1918-1919), 570.
Atlantic & Pacific Tea Company v. *Cream of Wheat Company*, 227 Fed., 49.

APPENDIX.

Summary of the counts of the declaration.....23-36
(1) First count.....23-27
(2) Second count..... 27
(3) Third count.....27-28
(4) Fourth count.....28-29
(5) Fifth count..... 29
(6) Additional count.....29-36

List of Cases Relied Upon.

	PAGE
Anderson v. United States, 171 U. S., 604	20
Arbuckle v. Blackburn, 191 U. S., 406	5
Atlantic & Pacific Tea Company v. Cream of Wheat Company, 227 Fed., 49	21
Briggs v. United Shoe Machinery Company, 239 U. S., 49	6
Buckeye Powder Company v. Du Pont Powder Company, 196 Fed., 514	17
Cilly v. United Shoe Company, 152 Fed., 726	17
Corey v. Boston Ice Co., 217 Fed., 465	18
Defiance Water Co. v. Defiance, 191 U. S., 184, p. 191	4
Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S., 439	5
Dueber Watch-Case Manuf'g. Co. v. E. Howard Watch & Clock et al., 66 Fed., 637, p. 641	3
Eastern States Retail Lumber Dealers Assn. v. U. S., 234 U. S., 614	21
Ficklen v. The Taxing District of Shelby County, 145 U. S., 1	9
Globe Newspaper Co. v. Walker, 210 U. S., 356	6
Fred L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S., 444	6
Healy v. Seagull Specialty Co., 237 U. S., 479	6
Hooper v. State of California, 155 U. S., 648	10
Hopkins v. United States, 171 U. S., 579	14
Lehigh Railroad Co. v. Cornell Steamboat Company, 218 U. S., 269	5
McLatchy v. King, 250 Fed., 920	17
Metcalf v. Watertown, 128 U. S., 586	4
Nash v. United States, 229 U. S., 374	20

PAGE

Newburyport Water Co. v. City of Newburyport, 193 U. S., 562, p. 576 4
Northern Securities Co. v. U. S., 193 U. S., 361 21
Norton v. Whiteside, 239 U. S., 144 5
Otis Elevator Company v. Geiger, 107 Fed., 133 17
Patterson v. U. S., 222 Fed., 599 20
Paul v. Virginia, 8 Wallace, 168 10
Rice v. Standard Oil Company, 134 Fed., 464 17
Simons v. Steamship Jefferson, 215 U. S., 130 5
State v. Morgan, 2 S. D., 32 14
State of Tennessee v. Union & Planters Bank, 152 U. S., 454 4
Trans-Missouri Case, 166 U. S., 320 21
Underground Railroad of the City of New York v. City of New York, 193 U. S., 417 5
Union Pacific Coal Company v. U. S., 173 Fed., 737 .. 20
U. S. v. Colgate & Company, U. S. Adv. Ops. (1918-1919), 570 21
United States v. E. C. Knight Company, 156 U. S., 2. 14
U. S. v. Whiting, 212 Fed., 466 20
United States Fidelity & Guaranty Co. of Baltimore, Md., v. Commonwealth of Kentucky, 231 U. S., 393 12
Williams v. Fears, 179 U. S., 270 12

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No. 638.
(26724)

BLUMENSTOCK BROTHERS ADVERTISING AGENCY,
Plaintiff in Error,

vs.

THE CURTIS PUBLISHING COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR THE CURTIS PUBLISHING COMPANY, DEFENDANT IN ERROR.

I.

THE DISTRICT COURT HAD NO JURISDICTION TO ENTERTAIN THIS SUIT UNLESS THE DECLARATION OF PLAINTIFF IN ERROR STATES A CAUSE OF ACTION UNDER THE PROVISIONS OF AN ACT OF CONGRESS APPROVED JULY 2, 1890, ENTITLED "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINT AND MONOPOLIES" (SHERMAN ACT).

The District Court sustained the motion to dismiss, made by defendant in error under special appearance,

found that the court had no jurisdiction over defendant in error and no jurisdiction to entertain the action, and dismissed the suit for want of jurisdiction. (Rec., p. 39.)

Plaintiff in error is a resident and citizen of the State of Missouri and defendant in error is a resident and citizen of the State of Pennsylvania. Under the provisions of Section 51 of the Judicial Code (Act of March 3, 1911), providing that suit can be brought only in the district of the residence either of plaintiff or defendant, defendant in error had the right to challenge the jurisdiction of the District Court of the Northern District of Illinois in so far as that jurisdiction was invoked on the grounds of diversity of citizenship between the parties. This is conceded by counsel for plaintiff in error. (Brief, p. 20.)

Nor could the District Court, over the objection of defendant in error, acquire jurisdiction over it because found in the district, by reason of the provisions of Section 7 of the Sherman Act, the controversy concerning a subject limited by federal law, unless plaintiff presents a case by its pleadings which is within that law.

The correctness of the foregoing statement seems obvious. Inasmuch as the right of defendant to be sued in the district of the residence of either plaintiff or defendant is a privilege which can be waived and which is waived by a general appearance, then if the mere filing of a declaration which purports to be under the Sherman Act, but in fact is not, is sufficient to give the court jurisdiction over the person of the defendant wherever found, there is nothing to prevent a plaintiff, where the requisite diversity of citizenship exists, thereafter amending a declaration, which is wholly insufficient in stating a cause of action under the Sherman Act, so as to set up an action of common law and thereby deprive

the defendant of the rights conferred and restrictions imposed by Section 51 of the Judicial Code. Such evasion of Section 1 should not be and, we submit, does not receive judicial sanction.

The limitations upon the jurisdiction of the court under Section 7 of the Sherman Act are recognized and pointed out by the Circuit Court of Appeals for the Second Circuit in the case of *Dueber Watch-Case Mamuf'g Co.* v. *E. Howard Watch & Clock Co. et al.*, 66 Fed., 637, on page 641, where the court says:

> "This action is manifestly one under the Act of July 2, 1890. It is brought in a district where neither the plaintiff nor the demurring defendant resides, but where the demurring defendant is found. In the face of a complaint so framed as to present a cause of action under the statute, a defendant, if 'found' here, could not object to the jurisdiction. It is expressly given by the seventh section. It would be manifestly unfair to permit a plaintiff to bring a defendant into this court on a complaint declaring upon the statute, and thereafter, when such defendant has failed to question its jurisdiction under the statute, and has appeared generally in the case, to transform the cause of action into one at common law, and insist that defendant has waived any objection to the jurisdiction * * *."

Therefore, defendant in error, in the case at bar, entering its special appearance solely for the purpose of objecting to the jurisdiction of the court over it, moved the court to quash service of process and dismiss the suit, for the reason that it was apparent from the allegations of the declaration that the District Court had not acquired jurisdiction over the defendant by reason of any cause of action under the Sherman Act presented by said declaration. That the court, in considering said motion and in determining the question of its jurisdiction over defendant in error, had the right to consider the allegations in plaintiff's declaration seems clearly

established by the cases of *The State of Tennessee* v. *The Union & Planters Bank*, 152 U. S., 454; *Metcalf* v. *Watertown*, 128 U. S., 586.

It is conceded by counsel for plaintiff in error that if the declaration in the instant case does not raise a substantial question under the Sherman Act, the District Court had no jurisdiction of this action, but it is urged that such substantial question may be presented, even though the averments of the declaration fail to state a cause of action under the act. (Brief, p. 9.) It is conceivable that a substantial question under the act might be presented where the allegations of the declaration state a cause of action under said act, though defectively, which defects under common law pleading should be reached by special demurrer; but, it is inconceivable that any such substantial question can be presented under the Sherman Act when the allegations of a declaration wholly fail to state any cause of action within the provisions of that law. The fact that the action purports to be one under the Sherman Act is, we apprehend, obviously insufficient to confer jurisdiction upon the court. This court said in the case of *Newburyport Water Co.* v. *City of Newburyport*, 193 U. S., 562, page 576:

> "If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because averment is made as to the existence of a constitutional question, if it plainly appears that such an averment is not real and substantial but is without color of merit * * *"

and again in *Defiance Water Co.* v. *Defiance*, 191 U. S., 184, on page 191:

> "We have repeatedly held that 'when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the

Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground.'"

To the same effect are *Underground Railroad of the City of New York* v. *City of New York*, 193 U. S., 417; *Arbuckle* v. *Blackburn*, 191 U. S., 406; *Norton* v. *Whiteside*, 239 U. S., 144.

And in determining whether in any action there is a substantial controversy respecting the Constitution or laws of the United States, this court will examine the pleadings to ascertain if the allegations state a cause of action under the Constitution or laws of the United States.

Delaware, Lackawanna & Western Railroad Company v. *Yurkonis*, 238 U. S., 439, wherein the court found that the allegations of the declaration did not state a cause of action under the Interstate Commerce Act.

Simons v. *Steamship Jefferson*, 215 U. S., 130, wherein the test applied was whether the facts set forth in the libel *prima facie* state a claim for salvage within the admiralty jurisdiction.

When the controversy concerns a subject limited by federal law, the jurisdiction so far coalesces with the merits or, as in the instant case, with the averments in the pleadings that a case not within the law is not within the jurisdiction of the court. *Lehigh Railroad Co.* v. *Cornell Steamboat Company*, 218 U. S., 269 (Admiralty); *Simons* v. *Steamboat Jefferson*, 215 U. S., 130 (Admi-

ralty); *Fred L. Grant Shoe Co.* v. *W. M. Laird Co.*, 212 U. S., 445 (Bankruptcy); *Healy* v. *Seagull Specialty Co.*, 237 U. S., 479 (Patent); *Briggs* v. *United Shoe Machinery Company*, 239 U. S., 49 (Patent); *Globe Newspaper Co.* v. *Walker*, 210 U. S., 356 (Copyright).

In the case of *Lehigh Railroad Co.* v. *Cornell, supra*, this court, speaking through Mr. Justice Holmes, said:

> "* * * It is said that the dimissal of the libel, although expressed to be for want of jurisdiction, really is on the merits, because payment of a judgment at common law is not a ground for contribution from a joint wrongdoer, not a party to the suit. There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining merits, and, no doubt, this case presents that difficulty. But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim, it is of a kind that the admiralty not only ought not to enforce, but has no *power* to enforce * * *."

None of the cases cited by counsel for plaintiff in error is in conflict with the propositions announced above. And the inquiry is, therefore, presented as to whether the allegations in the declaration in this case present any cause of action under the Sherman Act.

II.

IN NO COUNT OF PLAINTIFF'S DECLARATION IS A CAUSE OF ACTION STATED WITHIN THE PROVISIONS OF THE ACT OF CONGRESS APPROVED JULY 21, 1890, ENTITLED "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINT AND MONOPOLIES."

For the convenience of the court, the allegations of the various counts in the original declaration filed by plaintiff in error (Rec., pp. 4-27), together with the addi-

tional count (Rec., pp. 3-37), are summarized in an appendix attached to this brief.

In substance, these counts charge that the defendant conducts three magazines in which it publishes large amounts of advertising in a "certain field" (the field being undisclosed) and that the defendant occupies a "predominant position" in this undisclosed field; that the plaintiff is an advertising agent entrusted by a large number of advertisers with the placing of the advertising of these various customers in the various magazines comprising this undisclosed field. Plaintiff claims the right to determine in what magazines its customers' advertisements shall be placed. Whether plaintiff actually has that right as against its principals, or if it has it how it acquired it, does not clearly appear. But, plaintiff, asserting that it has the right to apportion the advertising of its principals among defendant and the other magazines comprising this undisclosed field in any manner that plaintiff sees fit, charges that defendant disputes this right of plaintiff *as against defendant* and that defendant insists that it, defendant, shall exercise some control (either exclusive or jointly with plaintiff) as to the amount of business of plaintiff's customers which it, defendant, shall receive, if it receives any. Plaintiff insists that, while dealing with defendant on behalf of plaintiff's principals, it, the plaintiff, shall exercise sole and exclusive control over the proportion of that business which defendant may receive and insists that when plaintiff has, in the exercise of such exclusive control, determined that matter, defendant shall be bound to accept the business of plaintiff's principals on that basis and that, if it refuses so to do, it is guilty of a crime. And plaintiff says that the business of its various principals which it controls is very large and extensive and it would seemingly follow that, as a consequence, its control over

defendant's business ought of right to be very considerable.

It is not asserted, directly or indirectly, that defendant ever refused to accept the business of any principal of plaintiff or of any other advertiser. It is not asserted that defendant ever sought to impose any terms upon the acceptance of the business of any advertiser, whether plaintiff's principals or otherwise. The most that is charged is that a conflict arose between plaintiff and defendant as to whether defendant might exercise a certain control over the terms on which it should do business with plaintiff or whether, on the other hand, it rightly rested solely with plaintiff to determine how much business of plaintiff's principals defendant might have and how much of such business defendant was bound to accept after such determination by plaintiff.

Defendant, on the other hand, contends: First, that no interstate commerce is involved in the subject of plaintiff's complaint; second, that, apart from this question, no violation of the Sherman Act is disclosed; and that to confirm in plaintiff the right which it asserts over the business of the defendant would be to recognize in plaintiff the very control over defendant's business which plaintiff says that it, defendant, ought to be denied over its own business; and that, if plaintiff's business is as extensive as he says it is, and has the wide future for which plaintiff hopes, the plaintiff, if he is given the right over defendant's business which he here claims, would in time acquire the power to ruin defendant or let it live, as plaintiff might choose.

THE TRANSACTIONS COMPLAINED OF IN THE DECLARATION DO NOT CONSTITUTE INTERSTATE COMMERCE.

The pertinent inquiry is not, as suggested by counsel for plaintiff in error (Brief, p. 32), as to whether the defendant in error was engaged in interstate commerce but is as to whether the transactions detailed in the declaration and upon which plaintiff in error's alleged grievances are grounded are in themselves transactions of interstate commerce. For even though it be conceded that with respect to the sale and distribution of its magazines, defendant in error is engaged in interstate commerce, nevertheless, we submit, it by no means follows that the particular transactions which form the gravamen in this case constitute transactions in interstate commerce.

Plaintiff in error is an advertising agency; defendant in error, the publisher of certain magazines. The gist of the complaint is that defendant in error refused to accept and enter into some certain contracts for advertising (the character not specified) which plaintiff in error on behalf of its principal (not disclosed) attempted to negotiate with defendant in error. We find no averments in the declaration from which it can reasonably be inferred that any of the contracts for advertising, which plaintiff in error proposed to place elsewhere and which defendant in error demanded for itself, related to or had any reference to interstate trade or commerce or that interstate trade was in the slightest degree involved therein. That plaintiff in error in attempting to, or, in fact, in negotiating any contract for advertising was not engaged in interstate commerce seems apparent from the case of *Ficklen* v. *The Taxing District of Shelby County*, 145 U. S., 1, wherein this court held that a broker, although engaged in negotiating sales between residents

of the State of Tennessee and nonresident merchants of goods situated in another state, was not engaged in interstate commerce.

Nor can it reasonably be inferred from the declaration that any interstate commerce of any of the competitors of defendant in error is involved, for there is no charge that defendant attempted to restrict the publication and distribution of competing magazines but, at most, that it attempted to secure contracts for advertising itself and thereby prevent its competitors from obtaining the same.

We submit that a contract made between an advertiser and a publisher of a magazine whereby, for a consideration, the publisher agrees to insert in its publication an advertisement is not in itself a transaction of interstate commerce, even though thereafter the publication containing such advertisement be sold and distributed throughout several states of the United States.

A clear distinction has always been drawn by this court between interstate commerce or an instrumentality thereof on the one hand and the mere incidents which may attend the carrying on of such commerce on the other. In the case of *Hooper* v. *State of California*, 155 U. S., 648, this court said:

> "It is evident, then, as we have said above, that the attempt to so distinguish between policies of marine insurance and policies of fire insurance, as to reach the deduction that there is a constitutional difference between the business of a corporation issuing policies of one kind and that of a corporation dealing in policies of the other kind, which affects the question of a state's authority to control the business of either, is based upon a fundamental misconception of the nature of the constitutional provision relied upon. It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate

commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature.

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.' "

Again, in *Paul* v. *Virginia,* 8 Wallace, 168:

"The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the insured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence in value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale."

This language is most apt when applied to the so-called contracts for advertising under consideration. They are, at the most, contracts for the dissemination of information concerning the advertiser's wares for a consideration paid by the advertiser. These contracts are not articles of commerce in any proper meaning of the words any more than are insurance policies. Following the publication and distribution of such advertisements, transactions of interstate commerce may thereafter re-

sult between the advertiser and other parties, or such transactions may be wholly intrastate. But, so far as the contracts for the advertisement is concerned, in the language of *Paul* v. *Virginia, supra,* "They are not subjects of trade and barter offered in the market as something having an existence in value independent of the parties to them."

We will now advert briefly to other cases in which this court, observing and adhering to the distinction pointed out in the *Hooper* case, has refused to hold transactions analagous to those here considered interstate commerce.

In *Williams* v. *Fears,* 179 U. S., 270, the court held that labor agents engaged within the State of Georgia in hiring laborers to be employed outside the state were not engaged in interstate commerce and said:

> "* * * These labor contracts were not in themselves subjects of traffic between the states, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, * * *."

United States Fidelity & Guaranty Co. of Baltimore, Md., v. *Commonwealth of Kentucky,* 231 U. S., 394, holds that attorneys on the guaranteed list of a foreign corporation, furnished to subscribing business men and merchants, who, upon request of any such subscriber, are to inquire into and report upon the credit and standing of persons engaged in doing business within the state with whom such subscriber may contemplate business dealings, are not engaged in interstate commerce, although some of the inquiries may be received from merchants without the state, in anticipation of future commercial interstate transactions. The court said:

> "* * * They did not sell or offer to sell any goods, nor deliver or offer to deliver any, and had

nothing to do with buying, selling, transporting, delivering or handling any merchandise. If any commercial transaction took place between the merchant whose standing was reported and the merchant to whom the report was sent, it was due entirely to negotiations between them with which the reporting attorney had nothing to do. * * * There is no direct or necessary connection between the service performed by plaintiff in error through its representatives and the making or fulfillment of commercial contracts. The most that can be said is that inquiries received by those representatives in Kentucky with respect to the credit and standing of persons engaged in business in that state may be received from merchants without the state in anticipation of commercial transactions between them in the future. But, on the other hand, similar inquiries may be received from merchants in Kentucky, and may have reference alone to intrastate, and not to interstate, transactions. * * * The circumstances that in a substantial number of cases—even if in the greater number—there is correspondence, by letter or otherwise, from state to state, which may perhaps have an effect upon the conduct of other parties about entering or not entering into transactions of interstate commerce, is not controlling."

In the foregoing case, *International Text Book Company* v. *Pigg*, 217 U. S., 91, cited and relied upon by plaintiff in error is distinguished, and the controlling facts which led this court to the conclusion that the Text Book Company was engaged in interstate commerce were thus set forth:

"In the case of the International Text Book Company, there was a systematic and continuous interstate traffic in instruction papers, textbooks, and illustrative apparatus for the course of study pursued by means of correspondence, and this was held to be in its essential characteristics commerce among the states within the meaning of the Federal Constitution and entitled thereunder to exemption from any direct burden imposed by state legislation."

In *Hopkins* v. *United States*, 171 U. S., 579, this court held that the business of buying and selling live stock in the stockyards of the city by members of the Stock Exchange as commission merchants is not interstate commerce, although most of the purchases and sales are of live stock sent from other states, and the members of the Stock Exchange are employed to sell by letter from the owners of the stock in other states, send agents to other states to solicit business, advance money to the cattle owners, pay their drafts and aid them in making cattle fit for the market.

In *United States* v. *E. C. Knight Company*, 156 U. S., 1, the Sherman Act was held to have no application to contracts relating exclusively to the acquisition of sugar refineries and the business of sugar refining in the state, and that an attempt to monopolize manufacture was not an attempt to monopolize commerce, even though in order to dispose of the product the instrumentality of commerce was necessarily invoked.

In *State* v. *Morgan*, 2 S. D., 32 (writ of error dismissed 159 U. S., 261), it was held that a mercantile commission agency was not engaged in interstate commerce in the collection and dissemination of information, whether within or without the state.

Without analyzing in detail the cases cited by counsel for plaintiff in error on this branch of the case, it will suffice to say that an examination of these cases discloses facts widely variant from those under consideration and in each of the cases upon which counsel relies, the transactions were part and parcel of contracts in and of themselves contracts of interstate commerce.

The case of *Preston* v. *Finley*, 72 Fed., 850, involved a direct restraint upon the delivery and sale of newspapers.

The cases of *City of Lukins*, 164 Pac., 1164; *Circular Advertising Company* v. *American Mercantile Company*, 66 Fla., 96, and *Marienelli* v. *United Booking Offices*, 227 Fed., 165, all involved actual shipments in or contracts directly relating to interstate commerce. The case of *McCall* v. *California*, 136 U. S., 104, was distinguished by this court in the later case of *Williams* v. *Fears*, 179 U. S., 269, cited *supra*, wherein it was pointed out that in the *McCall* case the business was directly connected with interstate commerce and consisted wholly in carrying it on; that the agent was the agent of the transportation company and acting solely in its interests.

APART FROM THE QUESTION OF INTERSTATE COMMERCE, NO CAUSE OF ACTION UNDER THE SHERMAN ACT IS STATED IN THE DECLARATION.

Plaintiff in error seeks to charge defendant in error with monopolizing or appearing to monopolize interstate commerce in advertising. There is no charge in any count of the declaration of any conspiracy, combination or contract between defendant and any other person to accomplish this end; nor are any facts stated, nor is any claim made that defendant is a "combination by fusion" or "corporate combination" as in the Standard Oil and Tobacco cases; nor is there any question arising under the Clayton Act. The declaration is grounded upon an alleged violation of Section 2 of the Sherman Act, but an analysis of the various counts of the declaration, we submit, reveals the want of allegations which by any reasonable inferences can be held to show a violation of the section in question.

INSUFFICIENCY OF DECLARATION TESTED BY RULES OF PLEADING.

The counts of the declaration are drawn in the most general language. No specific facts are alleged and no specific act of defendant in error is set forth, except that defendant in error refused to accept and enter into contracts for advertising with plaintiff in error. There are no averments as to the identity of any of the competitors of plaintiff in error in the alleged advertising field at the time in question, nor is there any averment that the business of any such competitors was, in fact, ever diverted to defendant in error, or that the business of any competitor was, in fact, ever diminished or restrained by the act of the defendant of which plaintiff in error complained.

It is charged that a certain restricted field of advertising (what field does not appear) is served by twenty magazines; that defendant has control of a large portion of the advertising offered to such periodicals and other publications (what control and what proportion do not appear and this defect is not aided by the statement of an obvious conclusion in the additional count that defendant in error held a "predominant position in said advertising field"); that the advertising rates of defendant in error are higher than those asked by other periodicals in this restricted advertising field and that defendant in error refused to receive advertising copy from the plaintiff in error, unless plaintiff in error permitted the defendant in error to control and limit the amount of advertising given by plaintiff in error to the publishers of other magazines.

The alleged reason for refusal on the part of defendant in error to deal with plaintiff in error is variously

stated in the other counts as coupled with the demand on the part of defendant in error that plaintiff in error take away from the publishers of other publications a large amount of advertising which had been given by plaintiff in error to such publications; that defendant in error refused to do business with plaintiff in error and "certain" other advertising agencies unless defendant in error was permitted to control and limit the amount of advertising given by such agencies, including plaintiff in error, to other magazines.

There are no averments in the declaration as to the alleged attempt of defendant in error to monopolize more specific than those hereinabove set out. These vague and indefinite averments can in no manner be aided by the statement that the acts of defendant in error were done with intent to violate the Sherman Act. That it is insufficient to declare generally in the language of the statute, but that facts must be stated with such particularity as to disclose a violation of the act seems to be settled by the authorities. *Rice* v. *Standard Oil Company,* 134 Fed., 464; *Cilly* v. *United Shoe Company,* 152 Fed., 726; *Buckeye Powder Company* v. *Du Pont Powder Company,* 196 Fed., 514; *Otis Elevator Company* v. *Geiger,* 107 Fed., 131; *McLatchy* v. *King,* 250 Fed., 920.

Tested by the rule laid down in the foregoing cases we submit that the allegations in the instant case are obviously too indefinite to state a cause of action under the Sherman Act. The facts as to the alleged competitors of defendant in error other than that they were twenty in number, the character of the business transacted by them, the character of business defendant in error attempted to monoplize, whether the result was successful or abortive, whether defendant had the ability

or potential ability to restrain interstate commerce, in short, all the pertinent facts which are essential to enable the court to determine whether a violation of the Sherman Act has been committed, are left by the pleader wholly to conjecture and imagination.

Equally deficient are the allegations concerning the alleged injury to plaintiff in error resulting from defendant's acts and such facts as are averred show no right in plaintiff in error to maintain this action under Section 7 of the Sherman Act. It appears that plaintiff in error was an agent in negotiating or attempting to negotiate contracts for advertising space for and on behalf of certain persons (not disclosed). It does not appear that plaintiff in error had contracts with any of the principals in question, neither is there any averment that either plaintiff in error or any of said principals had any contract with defendant in error, or with any other publisher, with relation to advertising space. Whether plaintiff in error was paid for its services regardless of the fact as to whether it was successful in negotiating the contracts in question, or whether such compensation was contingent upon the successful negotiation of such contracts, does not appear. Plaintiff in error as agent of its principals was engaged in rendering personal service and not in buying, selling and dealing in any commodity. The situation presented by the declaration is that of an agent relieved of his duties by his principal in strict accord with the principal's legal rights so to do. No injury to plaintiff in error in its business or property is shown. *Corey* v. *Boston Ice Co.*, 207 Fed., 465.

The charge that because of the refusal of defendant in error to enter into contracts with plaintiff in error, plaintiff in error lost the business of its customers in

the placing of advertising with defendant in error and with other publications and was prevented from making further contracts with customers for advertising in the publications of defendant in error and "in consequence thereof in any other publication of like or similar character" presents a *non sequitur*.

SUBSTANTIVE INSUFFICIENCY OF DECLARATION.

Denying to defendant in error the right to exercise its, defendant in error's, discretion as to the amount of advertising which it will accept from plaintiff in error, plaintiff in error claims for itself the right to do the self-same acts which, it is asserted, when performed by defendant in error, constitute a violation of the Sherman Act. For, it appears from the averments of the declaration that plaintiff in error asserts the right to be the sole judge of the character and amount of advertising matter which it will place with any publication, and by this action it, in effect, asks the court to tie the hands of defendant in error in order that plaintiff may enjoy the exercise of its unbridled discretion, not over its own business, but over the business of defendant in error. The theory of plaintiff in error seems to be that while it is wicked that defendant in error should itself exercise any control over its own business, it is quite legitimate and eminently proper that the control over this business should be taken from the hands of defendant in error and given to plaintiff in error. We think the statement of the proposition demonstrates the utter want of any substantial controversy here arising under the Sherman Act.

Since the decision of this court in the Standard Oil and Tobacco cases, it appears to be now settled beyond dispute that not every act which restrains trade is a vio-

lation of the statute but only such as by reason of intent or the inherent nature of the contemplated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. This rule has been reaffirmed in the later case of *Nash* v. *United States*, 229 U. S., 373. In addition to the test of reasonableness of the restraint of interstate trade, we understand the rule to be that if the immediate result of the acts in question is to foster a particular trade or business and but incidentally and indirectly to restrict competition or interstate trade, there is no violation of the Sherman Act. *Anderson* v. *United States*, 171 U. S., 604; *Union Pacific Coal Company* v. *U. S.*, 173 Fed., 737.

We again call to the attention of the court the fact that the defendant is not charged with being a party to any combination or conspiracy. It should also be borne in mind that there is no allegation in the declaration of any existing contract between defendant in error and plaintiff in error or between defendant in error or any principal of plaintiff in error whereby defendant in error was obligated to sell any advertising space to plaintiff in error or to any of the customers of plaintiff in error. The charge is that defendant attempted to monopolize the advertising business, and this implies an exclusion or attempted exclusion of competitors therefrom. *Patterson* v. *U. S.*, 222 Fed., 599; *U. S.* v. *Whiting*, 212 Fed., 466.

As was said by the Circuit Court of Appeals of the Sixth Circuit in the case of *Patterson* v. *U. S.*, *supra:*

> "Hence it would seem that there can be no monopolizing in making a single interstate sale, or in making a great number of such sales, even though wrongful means are used in making them. The wrong has been done the competitors, but the wrong is not that of monopolizing. In the very nature of

> things, but one competitor can make the sale. The idea that such conduct constitutes monoplizing is not according to the legal and accurate meaning of the word. It can only be such according to a popular conception thereof."

Plaintiff in error does not allege that there was any restraint by defendant upon the advertising business of any competing magazine, nor is there any allegation that any advertiser was denied access to defendant's publications or in any manner discriminated against by defendant in error because it chose to advertise in such competing magazines as the advertiser saw fit; nor that any such advertiser was not at perfect liberty to advertise or not to advertise in defendant's publication as he saw fit and to place his advertising with such competitors of the defendant as he might in unrestricted freedom determine. There is no question of price control. The sole complaint is that defendant in error attempted to monopolize the advertising business because it refused to accept advertisements from plaintiff in error, except upon conditions entirely consistent with the proper conduct by defendant in error of its own business.

An individual trader has full liberty to sell or not sell as he pleases. *Trans-Missouri case,* 166 U. S., 320; *Northern Securities Co.* v. *U. S.,* 193 U. S., 361; *Eastern States Retail Lumber Dealers Association* v. *U. S.,* 234 U. S., 614; *U. S.* v. *Colgate & Company,* U. S. Adv. Ops. 1918-1919, 570; *Atlantic & Pacific Tea Company* v. *Cream of Wheat Company,* 227 Fed., 49.

The sole means alleged to have been employed by defendant in error in its attempt to monopolize consisted in mere inaction or nonaction on its part, leaving plaintiff in error free to place any and all advertisements refused by defendant in error in any or all the so-called twenty competing magazines or periodicals. Far from

charging any direct and undue restraint of interstate trade, it is submitted that the declaration fails to charge any restraint whatsoever and is barren of any averments from which prejudice to the public interests can be deduced.

The averments in the declaration are a recital of nothing more than negotiations between plaintiff in error and defendant in error which failed to ripen into contractual relations between the parties. The court is asked to compel the assent of defendant in error to enter into such contractual relations upon terms which plaintiff in error may see fit to impose.

The failure of the declaration to state a cause of action, or, in other words, to present any substantial question under Section 7 of the Sherman Act is, we submit, apparent, and the action of the District Court in dismissing the suit for want of jurisdiction was correct.

Respectfully submitted,

AMOS C. MILLER,
SIDNEY S. GORHAM,
HENRY W. WALES,
GILBERT NOXON,
Attorneys for Defendant in Error.

APPENDIX.

The Declaration.

First count (Rec., pp. 4-8):

January 1, 1914, plaintiff was engaged at Chicago, Illinois, in conducting an advertising agency, and that in said business the plaintiff acted as agent for various and sundry customers or principals in placing the advertisements of such customers with the various journals, periodicals, magazines and other publications, including defendant's publications, and that for such service plaintiff earned great rewards, recompense, commissions, etc.; that defendant owned, controlled, published, sold and distributed three periodicals, known respectively as "The Saturday Evening Post," the "Ladies Home Journal" and the "Country Gentlemen"; that the circulation of the "The Saturday Evening Post" throughout the United States and the several states thereof amounted to between a million and a half and two million copies each week; that this periodical contains a great number of articles, essays, stories, serial novels and other reading matter of general interest to its readers, purchasers and subscribers throughout the United States; that the circulation of the "Ladies' Home Journal" is about one and one-half million copies per month; and that the circulation of the "Country Gentleman" is about two hundred thousand copies each week; that, in the conduct of its business in publishing such periodicals, the defendant held itself out at all times as ready, willing and desirous of receiving and publishing in such periodicals advertisements concerning articles

manufactured or offered for sale by various persons; that the defendant did, in fact, receive for publication advertisements from various persons; and, so doing, the defendant dealt with plaintiff and other advertising agencies, and recognized the various advertising agencies as the agents of the advertisers and defendant also dealt directly with the advertisers; that defendant's advertising facilities were especially valuable to plaintiff's customers, and that "the business thus done with the plaintiff and its customers was a business constituting commerce among the several states, or transactions of interstate commerce"; that the commercial business of the United States, as between merchants and manufacturers dealing with each other and with the public, "is dependent in its operations, growth and development, with reference particularly to modes of sale and distribution of goods and manufactures, upon the various advertising facilities offered by newspapers, journals, magazines and other periodicals published, sold and distributed throughout the United States and the several states"; that these publications constitute the chief method of presenting to the purchasing public the merchandise offered for sale; that the advertising facilities so offered by such newspapers, etc., including defendant's periodicals, were and are absolutely necessary to dealers, merchants and manufacturers to bring their articles to the attention of the public; that defendant's publications have an important position "among a certain number of periodicals, magazines, journals, publications and other advertising mediums" which are read by a large and increasing portion of the buying public in the several states; that there has been formed a large body of people, to whom such magazines, including defendant's, come and are read, and whose purchases of merchandise of dealers, including customers of the plain-

tiff, "for whom the plaintiff acted and does act as agent or representative," are to a large extent influenced by advertisements in such periodicals, including defendant's publications; that the commercial and manufacturing business of the United States at the time in question was dependent upon opportunity and facilities for advertising in the various journals, such as those published by defendant; that the magazines, journals and periodicals published by defendant, together with certain other magazines, periodicals and other publications published by persons other than defendant, "have to a great extent the exclusive control of a certain field of advertising more or less limited in number of advertisers"; that said advertisers are of great pecuniary value to such publications; that the magazines which control the advertising business of the field of advertising in question "do not now number more than, to wit, the number of twenty"; that such twenty publications are owned and published by not more than fifteen persons, firms or corporations; that for the advertising of the merchandise offered for sale by persons so advertising, including plaintiff's customers, there are no adequate facilities for advertising except that offered through the publications of the defendant and of the other publishers above mentioned; "that the defendant, at the time aforesaid and from thence hitherto, has and does have the control of a large proportion of the advertising business offered to such periodicals and other publications"; that the defendant's advertising rates are higher than the rates asked by owners of other advertising mediums covering the same restricted field of advertising; that defendant was desirous of acquiring for itself and its publications a monopoly of the restricted lines of advertising, contrary to and in violation of the provisions of the Act of Congress of July 2, 1890, and, "with intent to injure the

property and business of the plaintiff by means which are forbidden and declared to be unlawful by said Act of Congress, the defendant did then and there refuse, and since then hitherto has refused, without any reasonable cause or pretense for such refusal, to accept the proper and ordinary advertising matter or copy offered in the reasonable and usual way to the defendant by the plaintiff for printing and publication by the defendant in its periodicals or publications aforesaid, and particularly in the said "The Saturday Evening Post," although the plaintiff did then and there tender such advertising matter in the usual and ordinary way to the defendant, and did then and there offer to pay to the said defendant, the usual and regular sum or sums of money asked by the defendant for publication of advertising matter in its said publication, but defendant so refused, and has continued so to refuse, to accept or publish said advertisements offered to it by the plaintiff in behalf of the said customers of the plaintiff, unless the plaintiff agreed to permit the defendant to control and limit at the arbitrary will of the defendant the amount of advertising given by the plaintiff to the owners or publishers of the other magazines, journals, periodicals and other publications aforesaid competing with the defendant for and in the field of advertising above mentioned and described"; that, by reason of these wrongful acts illegally done by defendant in pursuance of its attempt to create a monopoly and to monopolize said advertising business, plaintiff has lost the business of its customers, for whom it was acting as agent in placing advertisements in the publications of defendant and other publications, and was prevented from making further contracts with customers to place advertising matter in defendant's publications and in any other publications of a like or similar character; that the business

of plaintiff was restrained and diminished and injured to the extent of twenty-five thousand dollars ($25,000), and to recover threefold said damages, this suit is brought.

Second count (Rec., pp. 8-13):

The allegations of the second count are substantially the same as those contained in the first count, except that the specific act of the defendant complained of is set forth as follows:

> "The defendant so refused and has continued so to refuse, to accept or publish such advertisements offered to it by the plaintiff on behalf of the said customers of the plaintiff, unless the plaintiff agreed to give to the defendant a preponderating amount of advertising business and a greater amount than it gave or could give to the other persons, firms or corporations publishing magazines, journals, periodicals and other publications, which were then and there competitors of the defendant and of the publications of the defendant, in regard to the publications of such advertisements, and the defendant demanded of the plaintiff that it take away from the said publishers and owners of other similar publications as aforesaid a large amount of the advertising which had been given by the plaintiff to such other publications not owned and published by the defendant."

Third count (Rec., pp. 13-18):

The general allegations of the third count are substantially the same as those of the first count, except that it is alleged in said third count that the defendant, desiring to secure a monopoly of restricted lines of advertising, and with intent to injure plaintiff's business and that of other advertising agencies and of owners and publishers of magazines and periodicals similar to and in competition with those owned by defendant, and to obtain or attempt to obtain a monopoly of the re-

stricted line of advertising, without any reasonable cause or pretense for refusal, did refuse to accept proper and ordinary advertising matter offered to the defendant by the plaintiff and by certain of the other said advertising agencies and it is further alleged as follows:

> "But defendant so refused, and has continued so to refuse, to accept or publish such advertisements offered to it by the plaintiff on behalf of the said customers of the plaintiff, and by the other said agencies on behalf of their respective customers, unless they each agreed to permit the defendant to control and limit at the arbitrary will of defendant the amount of advertising given by said agencies, including the plaintiff, to the owners or publishers of other magazines, journals, periodicals and other publications aforesaid competing with the defendant for and in the field of advertising above mentioned and described."

Fourth count (Rec., pp. 18-23):

The allegations of the fourth count are substantially the same as the others, except that it is alleged that the defendant's refusal to accept advertising was with intent to injure the business of the plaintiff, of the other advertising agencies and of the owners and publishers of magazines and periodicals in competition with those published by defendant. The allegation concerning defendant's refusal is as follows:

> "But defendant so refused, and has continued to so refuse to publish such advertisements offered to it by the plaintiff on behalf of the said customers of the plaintiff and by the other said agencies on behalf of their respective customers, unless the plaintiff and the other said agencies respectively agreed to give to the defendant a preponderating amount of advertising business and a greater amount than they respectively gave or might give to the other persons, firms, corporations, publishing magazines, journals, periodicals and other publications, which were then and there competitors of the defendant and of the publications of the defendant, in regard

to the publication of such advertisements, and the defendant demanded of the plaintiff that it take away from the said publishers and owners of other similar publications as aforesaid a large amount of the advertising, which had been given by the plaintiff to such other publications not owned and published by the defendant."

Fifth count (Rec., 23-27):

Common law count. As plaintiff in error concedes that this action cannot be maintained against defendant in error based upon this count, it is unnecessary to set out the substances of its allegations.

Additional count (Rec., pp. 31-37):

The additional count alleges substantially that on January 1, 1914, plaintiff, a Missouri corporation, was engaged at Chicago, Illinois, in conducting an advertising agency and that in said business, plaintiff acted as agent for various and sundry customers or principals in the following manner: When customers or principals desired to place advertisements of their respective business and have the same distributed through magazines and periodicals, they would make plaintiff their agent and plaintiff would contract with defendant and other publishers and distributors of magazines for the publication in and distribution of advertising matter prepared by plaintiff, throughout the United States. The plaintiff had many such customers and placed the advertisements of such customers with the periodicals published and distributed by defendant and with other journals, periodicals, magazines and publications other than those of defendant, all of which journals, periodicals, magazines and publications were published and distributed throughout the United States; that there accrued to plaintiff great rewards, recompenses and commissions for the time and labor expended by plaintiff in placing

with said publications the said advertising matter for the purpose of having the same distributed throughout the United States.

That defendant was then and there a corporation of Pennsylvania, and was the owner and then and there published, sold and distributed throughout the United States three periodicals known as "The Saturday Evening Post," "The Ladies' Home Journal" and the "Country Gentleman"; that the business of defendant in publishing, selling and distributing such periodicals throughout the United States, was interstate commerce; that the "The Saturday Evening Post" was a weekly illustrated publication having a circulation of from one and a half to two million copies each week; that said "The Saturday Evening Post" contained in each weekly publication a great number of articles, essays, stories, serial novels, comments on matters of literary, commercial, political and general interest and a large amount of advertising and advertising matter of great interest to the readers throughout the United States; that said advertising matter constitutes a large part of all the matter contained in the "The Saturday Evening Post"; that the "Ladies' Home Journal" was a monthly magazine and the "Country Gentleman" a weekly magazine; that the circulation of both said last named publications was greatly diffused throughout the United States, the "Ladies' Home Journal" having a circulation of about one and a half million copies monthly and the "Country Gentleman" a circulation of about two hundred thousand copies weekly; that in the conduct of its business in publishing and distributing said periodicals throughout the United States, defendant held itself out at all times and particularly at the time and place aforesaid, as desirous of taking, receiving, printing, publishing and distributing through the United States, through its said

publications before mentioned, advertisements from any and all persons, firms and corporations concerning their businesses and occupations, or of and concerning articles offered for sale by them or by them manufactured, or of and concerning the advantages derived by the public from dealing with such advertisers; that defendant did receive for publication and distribution throughout the United States in said periodicals advertisements of the character and kind above mentioned; that in the course of said business defendant dealt with plaintiff and other advertising agencies similar to plaintiff by contracting for publication and distribution throughout the United States of advertising matter and that defendant recognized the various advertising agencies, such as the plaintiff, as the representatives and agents of the persons, firms and corporations whose business, goods or manufactures were sought to be advertised through defendant's publications; and that defendant, in the regular course of its business, dealt not only with the advertisers but with the advertising agencies, such as that owned by the plaintiff, and that all of such dealings and transactions between the defendant and advertising agencies were transactions of interstate commerce; that the facilities of advertising afforded by the defendant in its said publications were especially valuable and necessary to the customers of plaintiff in that the publications containing such advertisements reached and came to the attention of readers and subscribers to such publications and to the attention of persons throughout the United States interested in the advertisements contained therein, particularly to residents in the larger cities; and that the business done by defendant with plaintiff and its customers and with other advertising agencies and advertisers, that is the business of editing, publishing and distributing throughout the United States

of advertising matter, pursuant to contracts made with defendant, its customers, other advertising agencies and advertisers and the making of such contracts, constituted transactions of interstate commerce.

That commerce in the United States between merchants and manufacturers, doing business with each other and with persons of the public, is dependent in its operations, growth and development upon various advertising facilities offered by newspapers, journals, magazines and other periodicals such as those of defendant; that such newspapers, journals, magazines, periodicals and other publications constitute the chief method of presenting to the buying public of the United States articles, goods, merchandise and manufactures held out for sale; that the advertising facilities offered by such newspapers, journals, magazines and other periodicals, including the periodicals published by defendant, were necessary to dealers, merchants and manufacturers so as to bring their articles, goods, merchandise and products to the notice and attention of prospective purchasers throughout the United States; that defendant's periodicals, particularly, "The Saturday Evening Post," have an important position among a certain number of periodicals, magazines, journals, publications and other advertising mediums which reach and are read by a large and increasing portion of the public throughout the United States, who are ready and desirous to purchase the articles, goods, merchandise and products so advertised; that the "The Saturday Evening Post" holds in the field of periodicals of its type a predominant and preponderant position and for that reason it is the most necessary of any such advertising mediums to the customers of the plaintiff; that there has grown up a large body of persons throughout the United States by whom such publications, including those of defendant, are read and

whose purchase of goods, wares, merchandise and manufactures were to a great extent directed and influenced by the advertisements in such periodicals, including defendant's publications and especially the "The Saturday Evening Post" which, at said time, held a predominant position in the field of advertising herein described, and which carried a preponderating amount of certain classes of advertising matter, including the advertisements of goods, wares, merchandise and manufactures of the customers of the plaintiff and of other advertising agencies; that the commerce of the United States, as it existed at the time aforesaid, was essentially dependent upon opportunities and facilities for advertising in the various journals, periodicals and publications of the kind above mentioned, especially the defendant's publication, "The Saturday Evening Post," which, as aforesaid, held a controlling and dominating position among advertising mediums of its own class and which, therefore, was an essential medium of advertising throughout the United States on which merchants, dealers and manufacturers of certain lines of goods, wares, merchandise and manufactures, including some of the customers of plaintiff, were necessarily dependent.

That defendant's periodicals, together with certain other magazines, periodicals and publications owned by persons other than defendant, had, to a great extent, the exclusive control of a certain field of advertising with a limited number of advertisers, but that said field of advertising was of great pecuniary value to such publications and to advertising agencies; that the magazines and other publications which control and do all the advertising business of the field of advertising in question, are, few in number; that for the advertising of goods and merchandise offered for sale in commerce, there were, at the time aforesaid, no adequate facilities except those

offered through the publications of defendant and the other publishers above mentioned, of similar magazines, but particularly of defendant, since the "The Saturday Evening Post" was recognized as holding a unique position as a medium for advertising on account of its predominant position in its field of publications, due to its wide circulation and distribution throughout the United States; that defendant, at the time aforesaid, had control of a large proportion of the advertising business offered to such periodicals and other publications; that on account of its preponderant position, the rates for advertising asked and received by defendant in its said publications, and particularly in the "The Saturday Evening Post" were, at the time aforesaid, much higher than the rates for such advertising asked by the owners of other periodicals and publications of the same class as the defendant covering the same restricted field of advertising and being distributed over practically the same geographical area; that defendant then and there was desirous of using its preponderant position in this special field of advertising as a means of acquiring for itself and its publications, especially for "The Saturday Evening Post," a monopoly of the publication and distribution of advertising matter in this restricted field of advertising throughout the United States, in violation of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and with intent to injure the property and business of plaintiff by means declared to be unlawful by said act, the defendant did, then and there, refuse, and since then has refused without any reasonable cause or pretense for such refusal, to accept proper and ordinary advertising matter or copy offered in the reasonable and usual way to the defendant by the plaintiff and other advertising agencies for printing and publication

and distribution throughout the United States and the several states thereof by the defendant in its said periodicals and particularly in the said "The Saturday Evening Post," which, as the defendant knew, stood in a preponderant position in the field of advertising above described, and was absolutely necessary as an advertising medium to the customers of plaintiff and therefore absolutely necessary to the prosperity and, in fact, to the continuance of plaintiff's business as an advertising agency.

Although plaintiff and such other advertising agencies did then and there tender such advertising matter in the usual and ordinary way to the defendant and did then and there offer to pay to said defendant the usual and legal sum or sums of money asked by defendant for the publication and distribution of advertising matter in said publications, defendant refused and has continued to refuse to accept or publish such advertisements offered to it by the plaintiff and such other agencies, on behalf of their said customers, unless the plaintiff and such other advertising agencies agreed to allow the defendant to increase its preponderance in said advertising field and increase its control of said advertising field by permitting the defendant to control and to limit and reduce, at the arbitrary will of the defendant, the amount of advertising given by the plaintiff and such other advertising agencies to the owners or publishers of the other magazines, journals, periodicals and other publications aforesaid, which were attempting to compete with the defendant for and in the field of advertising above mentioned and described.

By means of said illegal and wrongful acts, done by the defendant in pursuance of its attempt and scheme to create a monopoly for its own benefit in, and to monopolize said advertising business hereinbefore described,

plaintiff lost the business of its customers for whom it had been acting as agent in the placing of advertisements with defendant's publications and other publications, and was prevented from making further contracts with customers for the placing of their advertising matter in the publications of defendant and in consequence thereof, in any other publication of a like or similar character, and the business of the plaintiff was then and there and thereby greatly restrained and diminished and plaintiff then and there injured in its business and property by and through the illegal acts of the defendant to the loss and damage of the plaintiff in the sum of twenty-five thousand (25,000) dollars.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY *v.* CURTIS PUBLISHING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 197. Submitted January 26, 1920.—Decided April 19, 1920.

Jurisdiction based on diverse citizenship cannot be maintained in the District Court, over defendant's objection, in a district where neither party resides. P. 440.

To confer jurisdiction on the District Court over an action for triple damages under § 7 of the Sherman Anti-Trust Act, a claim under the statute, plainly real and substantial, must be set up by the averments. *Id.*

A business conducted by an advertising agency of placing, by contracts with publishers, advertisements for manufacturers and merchants, in magazines which are published and distributed throughout the United States, is not interstate commerce, although the circulation and distribution of the publications themselves be such; and a declaration claiming triple damages for injury alleged to have resulted from refusal of a publisher to accept such advertisements from such an agency pursuant to an attempt of the publisher to monopolize the business of publishing such advertising matter, fails to state a claim or cause of action of the substantial character requisite to confer jurisdiction on the District Court under the Sherman Anti-Trust Act. P. 441. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, distinguished.

Affirmed.

THE case is stated in the opinion.

Mr. Colin C. H. Fyffe for plaintiff in error. *Mr. Paul N. Dale* and *Mr. David R. Clarke* were on the brief.

Mr. Amos C. Miller for defendant in error. *Mr. Sidney S. Gorham, Mr. Henry W. Wales* and *Mr. Gilbert Noxon* were on the brief.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by the Blumenstock Brothers Advertising Agency against the Curtis Publishing Company in the District Court of the United States for the Northern District of Illinois to recover treble damages under § 7 of the Sherman Anti-Trust Act. 26 Stat. 209. The case here concerns the question of the jurisdiction of the District Court. Judicial Code, § 238. The plaintiff is a corporation of the State of Missouri, the defendant a corporation of the State of Pennsylvania. The defendant appeared specially in the District Court and moved to dismiss the complaint for want of jurisdiction, the grounds stated being:

1. "That in each of the counts of plaintiff's original declaration, and in the additional count thereof, it appears that the plaintiff is a citizen and resident of the State of Missouri, and that this defendant is a citizen and resident of the State of Pennsylvania."

2. "That in none of said counts is a cause of action stated by plaintiff within the provisions of the Act of Congress approved July 2nd, 1890, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies.'"

The court entered judgment dismissing the suit for want of jurisdiction over the defendant or the action.

The record contains a certificate stating that the court found that it had no jurisdiction of the defendant and no jurisdiction to entertain the action. The certificate further states, that the question involved is whether the transaction set forth in the several counts of the declaration involves a question of interstate commerce, and whether the averments in said several counts of the declaration state a cause of action within the provisions of the Act of July 2, 1890.

The declaration is voluminous, containing five counts

and an additional count. So far as it is necessary for our purpose the cause of action of the plaintiff may be said to rest upon the allegations: That the plaintiff is engaged at Chicago in conducting an advertising agency. That when customers or principals desire to place advertisements in the magazines and periodicals of the trade they make plaintiff their agent, and plaintiff contracts with the defendant and other publishers and distributors of magazines; that plaintiff had many customers for whom it placed advertisements in the periodicals published and distributed by the defendant and in other periodicals of other publishers, all of which were distributed throughout the United States and the several States thereof; that the defendant was the owner and publisher of three periodicals sold and distributed throughout the United States known as "The Saturday Evening Post," "The Ladies Home Journal," and "The Country Gentleman;" that the business of the defendant in publishing, selling and distributing said periodicals was interstate commerce. The character of each of the several publications is described, and a large circulation is attributed to each of them; and it is stated that in publishing and distributing said periodicals defendant held itself out as desirous of taking, receiving, printing, publishing, and distributing throughout the United States its publications and advertisements to persons, firms and corporations concerning their business and occupation; that in the course of the business the defendant dealt with the plaintiff and other advertising agencies; that the defendant in the regular course of its business dealt with not only advertisers, but with advertising agencies such as the plaintiff, and it is alleged that such dealings were transactions of interstate commerce, and that the business of editing, publishing and distributing throughout the United States the advertising matter contained in said publications, pursuant to contracts made with its customers and advertising

agencies, was interstate commerce; that such commerce is dependent for its operation and growth upon advertising facilities offered by magazines and periodicals such as those of the defendant, and that such publications constitute the chief method of presenting to the buying public the articles held out for sale; that the advertising facilities were necessary to dealers, merchants, and manufacturers in order to bring their products to the notice and attention of purchasers; that the defendant's periodicals, particularly "The Saturday Evening Post," have an important position among such publications, and are largely read throughout the United States; that "The Saturday Evening Post" is the most necessary of such advertising mediums to the customers of the plaintiff; that the defendant's periodicals, together with certain other magazines, periodicals and publications owned by persons other than the defendant, had, to a certain extent, exclusive control of a certain field of advertising; that the magazines and other publications which control and do all the advertising business of the field in question are few in number; that for the advertising of goods and merchandise offered for sale in commerce there were no adequate facilities except those offered by the defendant and other publishers of similar magazines; that the defendant was desirous of using its preponderant position in this special field of advertising as a means of acquiring for itself and its publications, especially for "The Saturday Evening Post," a monopoly of the publication and distribution of advertising matter in this restricted field of advertising throughout the United States in violation of the Anti-Trust Act; that the defendant refused without any reasonable cause to accept proper and ordinary advertising matter or copy offered in the usual way to the defendant by the plaintiff and other advertising agencies unless the plaintiff, and other advertising agencies, would agree to allow the defendant to increase its preponder-

ance in said advertising field by permitting it to control and limit and reduce, at the will of the defendant, the amount of advertising given by the plaintiff and other advertising agencies to the owners and publishers of other magazines, journals, periodicals and other publications aforesaid, which were competing with the defendant in the field of advertising mentioned and described; that by reason of the illegal and wrongful acts, done by the defendant in pursuance of its attempt and scheme to create a monopoly for its own benefit in, and to monopolize the advertising business, plaintiff lost the business of its customers for whom it had been acting as agent in placing of advertisements with defendant's and other publications, and was prevented from making further contracts for the placing of advertising matter in publications of the defendant, and in consequence thereof, in any other publication of a like or similar character, to the damage of the plaintiff in the sum of $25,000.

The declaration contains an alleged cause of action at common law, but as neither the plaintiff nor the defendant reside in the district in which the suit was brought, it is conceded that such cause of action could not be maintained in that court against the defendant's objection. Section 51, Judicial Code.

The Sherman Anti-Trust Act (§ 7) created a cause of action in favor of any person to recover by suit in any District Court of the United States, in the district in which the defendant resides or is found, three-fold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the act. In order to maintain a suit under this act the complaint must state a substantial case arising thereunder. The action is wholly statutory, and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.

In some cases it is difficult to determine whether a ruling dismissing the complaint involves the merits of the cause of action attempted to be pleaded or only a question of the jurisdiction of the court. In any case alleged to come within the federal jurisdiction it is not enough to allege that questions of a federal character arise in the case, it must plainly appear that the averments attempting to bring the case within federal jurisdiction are real and substantial. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576.

In cases where, as here, the controversy concerns a subject-matter limited by federal law, for which recovery can be had only in the federal courts, the jurisdiction attaches only when the suit presents a substantial claim under an act of Congress. This rule has been applied in bankruptcy cases (*Grant Shoe Co.* v. *Laird Co.*, 212 U. S. 445;) in copyright cases (*Globe Newspaper Co.* v. *Walker*, 210 U. S. 356;) in patent cases (*Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479;) in admiralty cases (*The Jefferson*, 215 U. S. 130).

We come then to inquire whether the cause of action stated was a substantial one within § 7 of the Sherman Anti-Trust Act. It is not contended that any combination, conspiracy, or contract in restraint of trade is alleged such as would bring the case within the first section of the act. The second section is relied upon which in terms punishes persons who monopolize or attempt to monopolize, or combine with others to monopolize any part of trade or commerce among the several States or with foreign nations.

The Anti-Trust Act, it is hardly necessary to say, derives its authority from the power of Congress to regulate commerce among the States. It declares unlawful combinations, conspiracies, and contracts and attempts to monopolize which concern such trade or commerce. It follows that if the dealings with the defendant, which

form the subject-matter of complaint, were not transactions of interstate commerce, the declaration states no case within the terms of the act.

Commerce, as defined in the often quoted definition of Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, is not traffic alone, it is intercourse, "It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce.

This case is wholly unlike *International Textbook Co.* v. *Pigg*, 217 U. S. 91, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of federal control, and to exempt it from the burden imposed by state legislation. This case is more nearly analogous to such cases as *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, wherein this court held that a broker engaged in negotiating sales between residents of Tennessee and non-resident merchants of goods situated in another State, was not engaged in interstate commerce; and within that line of

cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse. *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495. We held in *Hopkins* v. *United States*, 171 U. S. 579, that the buying and selling of livestock in the stockyards of a city by members of the stock exchange was not interstate commerce, although most of the livestock was sent from other States. In *Williams* v. *Fears*, 179 U. S. 270, we held that labor agents engaged within the State of Georgia in hiring persons to be employed outside the State were not engaged in interstate commerce. In *Ware & Leland* v. *Mobile County* 209 U. S. 405, we held that brokers taking orders and transmitting them to other States for the purchase and sale of grain or cotton upon speculation were not engaged in interstate commerce; that such contracts for sale or purchase did not necessarily result in any movement of commodities in interstate traffic, and the contracts were not, therefore, the subjects of interstate commerce. In the recent case of *United States Fidelity & Guaranty Co.* v. *Kentucky*, 231 U. S. 394, we held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the State, was not unconstitutional as a burden upon interstate commerce as applied to a non-resident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the State. The contention in that case, which this court denied, was that the service rendered through the representatives in Kentucky, and other representatives of the same kind acting as agents of merchants engaged in interstate commerce, to furnish them with information through the mails, or by telegraph, or telephone, as a result of which merchandise might be transported in interstate commerce,

or withheld from such transportation, according to the character of the information reported, was so connected with interstate commerce as to preclude the State of Kentucky from imposing a privilege tax upon such business.

Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the groundwork for such contentions as are undertaken to be here maintained under § 7 of the Sherman Anti-Trust Act. The court was right in dismissing the suit.

Affirmed.

ASKREN, ATTORNEY GENERAL OF THE STATE